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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1949

No. 243

ALTHEA I. CUNNINGHAM,
Petitioner,

vs.

CITY OF CHICAGO, a Municipal Corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, AND BRIEF IN SUPPORT THEREOF

GEORGE A. MASON,
GEORGE A. MASON, JR.,
WEIGHTSTILL WOODS,
69 W. Washington Street,
Chicago 2, Illinois.
Attorneys for Petitioner.

GEORGE A. MASON,
GEORGE A. MASON, JR.,
WEIGHTSTILL WOODS,
Of Counsel.

BARNARD & MILLER, 33 S. Market St., Chicago 6. FRanklin 2-0562

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PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE SUPREME COURT:

Althea I. Cunningham prays that a writ of certiorari be issued by this court to review the decree and opinion of the Appellate Court of Illinois, First District, rendered January 24, 1949, affirming a decree against your petitioner entered by the Circuit Court of Cook County, Illinois, dismissing her amended complaint in chancery which was filed April 15, 1948. (See pages 6-10 below)

Petitioner sought relief by petition for leave to appeal to the Supreme Court of the State of Illinois and that peti-

tion was denied by order of May 12, 1949. (Rec. ....) Petitioner has exhausted all judicial remedy before the courts of Illinois.

The Circuit Court and the Supreme Court filed no opinions. The opinion by the Appellate Court of Illinois, First District, is in the record at page ..... That is the highest court of Illinois which would pass upon this record.

There has never been any trial by evidence in this record. By arbitrary rulings the Illinois courts have prevented any discovery or accounting of the trust fund in chancery.

ORDER OF CIRCUIT COURT.

This order is a mere dismissal as follows:

> "It Is Therefore Ordered that the complaint as amended and all counts thereof be and the same is hereby stricken, and the suit dismissed at plaintiff's costs." (Rec. 32)

No findings whatever were made.

In the Appellate and Supreme Courts of Illinois, the City of Chicago stated its defense as follows:

> "The claim of petitioner is solely for interest and therefore barred by the statute of limitations because suit was not started within five years after payment of the principal of the judgment."

ACTION BY APPELLATE COURT.

The opinion on review (Rec. ....) as to claim in chancery merely says "plaintiff's theory of a trust as set forth in their briefs is without merit." As stated above, the Circuit Court and the Supreme Court of Illinois gave no opinion.

DECREE AND OPINION FOR REVIEW.

The Illinois courts have disregarded the amended complaint in chancery filed by petitioner in the Circuit Court of Cook County in this case by leave of court on April 15, 1948, (Rec. 13) and have denied to your petitioner any hearing whatever upon the substance and merits of that complaint in chancery. Thereby the Illinois courts have denied any hearing upon substantial vested rights of your petitioner in equity, and have held adversely to your petitioner upon Federal questions based upon the constitution of the United States and hereinafter more fully set forth.

STATEMENT OF THE CASE.

This is an action to recover the unpaid interest on a judgment entered under section 42a of the Local Improvement act of Illinois (Ill. Rev. Stats. Ch. 24, par. 84-42a) awarding compensation for real estate of petitioner, taken in a combined improvement for the widening and improvement of a north and south street known as Garland Court (and for the improvement of East Haddock Place) in the block bounded by East South Water Street, North Michigan Avenue, East Lake Street and North Wabash Avenue in the City of Chicago.

The unpaid interest is part of the just compensation which is guaranteed by the Constitution. See below pages 14, 42 and 43.

On June 21, 1922, the City Council passed the ordinance for the combined improvement (Abst. 13, Rec. 23). Only two lots were condemned, being lots Nine (9) and Twenty-three (23) in Fort Dearborn Addition to Chicago.

Appellant was the owner of Lot Nine (9), and one Ada S. Garrett owned lot Twenty-three (23).

On November 28, 1922, the City of Chicago filed its petition in the County Court of Cook County, Illinois, in case

No. 49014 entitled "*City of Chicago* v. *Althea I. Cunningham,*" in conformity to the terms and provisions of said ordinance.

On September 29, 1924, the commissioners' report and assessment roll was filed in said cause; and as finally approved by the court, the total cost of the widening and improvement was fixed at $444,360, of which $384,000 was the total value of private property to be taken for the improvement; $49,180 was the cost of the improvement (omitting land to be acquired) as estimated by the engineer, and $11,180 was the estimated cost of making, levying and collecting the assessment and the lawful expenses attending the making of said improvement (Abst. 15, Rec. 23).

On June 9, 1926, final judgment was entered by the County Court in said case No. 49014 confirming the Commissioners' report and assessment roll as recast, and awarding the sum of $164,000 for the taking of said lot Nine (9). All of lots 9 and 23 was taken, leaving no remainders subject to assessment (Abst. 15, Rec. 23). There was no assessment against your petitioner.

On August 17, 1926, the special assessment to finance the improvement was certified for collection to the city collector and Warrant No. 51492 was thereupon issued and delivered to him by the clerk of the County Court, as more fully appears from the record of said warrant contained in Volume "Condemnation 10" at pages 406 to 427 of the records of said city collector (Abst. 16, Rec. 23).

On July 31, 1927, the warrant was returned to the county treasurer as to delinquent properties. All assessments collected by the city collector and the county treasurer, respectively, were paid and transferred by them to the treasurer of the City of Chicago (Abst. 16, Rec. 23).

On September 10, 1927, the City of Chicago paid to appellant, as the owner of said Lot Nine (9), the sum of

$41,000 on account of the award of $164,000 and on December 22, 1927, the city paid to her the further sum of $123,000, being the balance of the amount of said award of $164,000, but did not then or thereafter pay to appellant or to anyone in her behalf any of the interest which accrued on said award from and after June 9, 1926 (Abst. 16, Rec. 23), which is the date of judgment, and taking of the land.

Interest at five per cent per annum on said judgment of $164,000 from June 9, 1926, to September 10, 1927, the date of said first payment on account of the award, is the sum of $10,659.99 and interest on the balance of the award from September 10, 1927, to December 22, 1927, the date of the last payment on account thereof is the sum of $1,341.82, making a total of $12,001.81, for interest due and unpaid on said award on December 22, 1927.

In and by said final judgment $220,000 was awarded to the owner of said lot Twenty-three (23) and said award was paid by the city to Ada S. Garrett or to the conservators of her estate. In addition thereto the City of Chicago paid to her or her estate, interest on said award in the total amount of $8,284.88, of which $3,781.25 was paid on or about July 27, 1927, and $3,703.63 on or about September 7, 1927, and the further amount of $800 on or about April 13, 1942; all as more fully appears from the records of the comptroller of the City of Chicago and of the Board of Local Improvements (Abst. 17, Rec. 23).

Appellant's original complaint at law for unpaid interest was filed September 28, 1933 (Abst. 1, Rec. 3). On October 17, 1933, the City of Chicago filed its demurrer (Abst. 11, Rec. 14). No hearing was had upon that demurrer.

On April 15, 1948, by leave of court, appellant filed an amendment to the complaint containing a separate count in chancery (Abst. 13, Rec. 23). On April 26, 1948, appellee filed its motion to dismiss (Abst. 22, Rec. 34).

On April 29, 1948, an order was entered striking the complaint as amended and all counts thereof and dismissing the cause (Abst. 32, Rec. 43). See page 2 above.

RELIEF SOUGHT BY APPEAL.

On May 21, 1948, notice of appeal was filed. Appellant prays that (1) the judgment may be reversed or that (2) the judgment may be reversed and judgment entered in her favor and against defendant for the sum of $12,001.81, or that (3) the amount due and owing to plaintiff may be determined by the court and a decree and judgment entered against the defendant requiring it to pay such judgment or that (4) such other judgment be entered as to the court shall seem meet (Abst. 33, Rec. 45).

FACTS STATED BY THE COMPLAINT IN CHANCERY.

(Rec. 13 to 21).

"The ordinance of the City Council of Chicago provided for a condemnation and special assessment double improvement and the judgment therein awarding the sum of $164,000 to your petitioner as then value of her real estate to be taken for the improvement by final judgment June 9, 1926.

"On August 17, 1926, the special assessment levied for the payment of said local improvement was certified for collection to the city clerk of the City of Chicago and Warrant No. 51492 was thereupon issued and delivered to the city collector by the clerk of said County Court as more fully appears from the record of said warrant contained in Volume "Condemnation 10" at pages 406 to 427 of the records of said city collector. On July 31, 1927, said warrant was returned to the county treasurer for the collection of all delinquencies in the payment of said assessment. All amounts of principal and interest collected by the city collector

and the county treasurer, respectively, were paid and transferred by them to the treasurer of the City of Chicago.

"On September 10, 1927, the City of Chicago paid to the plaintiff, Althea I. Cunningham, as the owner of said lot nine (9) the sum of $41,000 on account of the award of $164,000 to be paid to the owner or owners of and parties interested in said lot, and on December 22, 1927, the City of Chicago paid to plaintiff the further sum of $123,000, being the balance of the amount of said award of $164,000, but did not pay to plaintiff or to any one in her behalf any interest accrued on said award from and after June 9, 1926, the date of entry of said final judgment in condemnation.

"Interest at five per cent (5%) per annum on said judgment debt of $164,000 from June 9, 1926, the date of entry of said final condemnation judgment, to September 27, 1927, the date of said first payment on account of the debt, is the sum of $10,659.99, and interest on the balance of the principal amount of said debt from September 27, 1927, to December 22, 1927, the date of the last payment on account thereof, is the sum of $1,341.82, or a total amount of $12,001.81 interest due and unpaid on said award.

"In and by said final judgment entered June 9, 1926, the amount of $220,000 was awarded to the owner or owners of and parties interested in said lot twenty-three (23) in block seven (7) in Fort Dearborn Addition, all of which was likewise condemned and taken for said improvement; that said amount of $220,000 was fully paid by the City of Chicago to one Ada S. Garrett as the owner of said lot twenty-three (23) or to the conservators of her estate, and in addition thereto the City of Chicago paid to her or to the conservators of her estate interest on said award in the total amount of $8,284.88 of which $3,781.25 was paid on or about July 27, 1927, and the amount of $3,703.63 was paid on or about September 7, 1927, and the amount of $800 was paid on or about April 13, 1942, all as more fully appears from the records of the comptroller of the City of Chicago and of said Board of Local Improvements."

Charging Part of Complaint in Chancery

Upon that foundation and recital of prior record fact, the count in chancery then continues by charging and asserting against the City of Chicago as follows:

"Under section 42a of the Local Improvement act as amended and in force on June 9, 1926, the special assessment levied for said improvement became a trust fund for the payment of just compensation for property to be taken. The plaintiff is a beneficiary of said trust fund and the City of Chicago is an express trustee to collect and distribute such fund to the parties entitled thereto. As such trustee the city has neither repudiated the trust nor brought any repudiation thereof to the notice of plaintiff as such beneficiary, and plaintiff is entitled to recover the trust fund or so much thereof as may be necessary to constitute just compensation for the property of plaintiff taken for said improvement. Plaintiff was the owner of and the only party interested in said Lot nine (9) and was and is entitled to receive all of the compensation for the taking of said property. Neither the statute of limitations nor laches has run against the plaintiff as a beneficiary of said trust fund.

"Plaintiff has a vested right in the special assessment levied and collected under section 42a for payment of the award and interest thereon where payment is delayed, and neither the statute of limitations nor laches can divest her of such right.

"Under section 32 of the Local Improvement act the liability of the City of Chicago for payment of just compensation is absolute and the plaintiff's right to such payment is a vested right which cannot be divested by the statute of limitations nor by laches.

"Section 13 of article 2 of the Constitution of Illinois provides that private property shall not be taken for public use without just compensation and the said section creates and establishes a constitutional lien in favor of the owner of property condemned for the amount of just compensation awarded therefor.

"The City of Chicago as petitioner in said condemnation proceeding elected to enter the final judgment provided in section 32 of the Local Improvement act as amended and thereby became bound and liable to pay

just compensation for said property whether the special assessment be collected or not and such judgment of condemnation was not conditional. The entry of final judgment under section 32 created and established a lien in favor of plaintiff upon the general funds of the City of Chicago and upon the special assessment levied and collected for said improvement.

"The entry of final judgment under section 42a of the Local Improvement act has created and established a lien in favor of plaintiff upon the general funds of the City of Chicago and upon the special assessment levied and collected for said improvement under said section 42a.

"That the general corporate fund of the City of Chicago is impressed with a trust for the payment of the just compensation due plaintiff and it is the duty of the City of Chicago as such express trustee to pay just compensation for the property of plaintiff either out of said special assessment so confirmed and collected or out of its general funds, both of which are impressed with an express trust for the payment of said just compensation. The duty to pay just compensation is by the constitution made a continuing one until it is fully discharged and satisfied.

"That the City of Chicago as such trustee has assembled and holds ample funds available for the payment of just compensation to plaintiff herein and for the satisfaction of the final judgment, and interest thereon, entered under said Local Improvement act.

Prayer of Complaint in Chancery

"WHEREFORE, your petitioner prays:

(a) That the City of Chicago, defendant herein, may be required to answer under oath this additional count as a separate complaint in chancery.

(b) That the City of Chicago be ordered to discover and account to plaintiff for all moneys applicable to the payment and satisfaction of the just compensation due plaintiff.

(c) That general relief and incidental remedies be granted to plaintiff."

Court Record Admission of Trust Res.

Attached to the complaint in chancery and made a part of it as Exhibit "A" is the money recapitulation prepared by the court commissioners, for the condemnation special assessment proceeding general number 49014, County Court of Cook County. One item thereof is the assessment against the City of Chicago which reads as follows: (Rec. 21)

> "Proportion of the total cost of said improvement (including estimate of value and damages, and the estimate of the cost of such proceeding), which will be of benefit to the public and assessed to the City of Chicago..... $228,766.38"

By entry of the condemnation-special assessment joint judgment the City of Chicago made itself on that date, June 9, 1926, trustee of that sum as part of the trust fund. Later it collected the balance of the trust fund and became possessed of the whole fund provided for by the judgment in the local improvement case.

DEFENSE BY CITY OF CHICAGO.

The only defense made to the complaint and count in chancery is a motion to dismiss (Rec. 22) supported by affidavit (Rec. 24) and exhibits (Rec. 26-31). The exhibits show that the amount of the original award to your petitioner was paid to her by checks drawn against warrant No. 51492 which is the special assessment trust fund established by Warrant No. 51492. By making these exhibits a part of the affidavit of the City of Chicago the existence of the trust fund is fully established and the payment thereout of original award money to your petitioner, is thereby admitted under oath by the defendant City of Chicago. That is admission by the trustee, City of Chicago, that petitioner as beneficiary of the trust fund should have in equity a discovery and accounting for that trust fund.

The only defense stated on review by the City of Chicago, was to claim there is an applicable statute of limitations. (Above page 2)

PLAINTIFF'S THEORY OF THE CASE AS STATED BY PETITIONER TO THE ILLINOIS COURTS.

"In a combined proceeding under section 42a of the Local Improvement act the special assessment levied for the improvement is a trust fund for the payment of just compensation for property taken.

"The owner of land taken or damaged is a beneficiary of the fund and the city is an express trustee to collect and distribute the fund.

"The city has not repudiated the trust. Plaintiff is therefore entitled to recover the fund or so much thereof as may be necessary to constitute just compensation for her property taken for the improvement.

"Neither the statute of limitations nor laches has run against the plaintiff as beneficiary of said trust.

"Plaintiff has a vested right in the special assessment collected under section 42a for payment of the award fixed by the judgment and interest thereon where payment is delayed. Neither the statute of limitations nor laches can divest planitiff of such right.

"Under section 42a of the Local Improvement act the liability of the City of Chicago for payment of just compensation is absolute and plaintiff's right to such payment is a vested right which cannot be divested by the statute of limitations or by laches.

"The entry of final judgment under section 42a created and established a preferred lien in favor of plaintiff upon the general funds of the City of Chicago. Plaintiff is not an ordinary judgment creditor of the city.

"The entry of final judgment under section 42a of the Local Improvement act created and established a constitutional lien in favor of plaintiff upon the general funds of the City of Chicago and upon the special assessment levied and collected for said improvement under said section.

"The duty to pay just compensation is by the constitution made a continuing one until it is fully discharged and satisfied.

"The city, recognizing its duty as such trustee, paid interest on the Garrett award as late as sixteen years after the entry of the final condemnation judgment.

"The City of Chicago as such trustee has assembled and holds ample funds available for the payment of plaintiff's judgment and interest thereon."

The facts of the case appear in the pleadings, and such of said affidavits as this Court may determine to be material. No evidence was heard by the Circuit Court. All orders were entered by the motion judge. No written opinion has been filed, except that by Illinois Appellate Court.

THEORY OF PETITIONER IN THIS COURT.

Condemnation proceedings provide a means of making a contract upon the court record for the purchase of real estate from an unwilling owner. All usual principles of equity and of chancery procedure which govern in ordinary sales of real estate, apply in the liquidation of that contract. Petitioners say that the judgment order is the signing of that contract, that the prior proceedings and the constitutional provisions are the terms of the contract. The seller and purchaser of real estate are trustees for each other in contracts off the court record, from the time that the contract is signed until it has been fully performed. Petitioners say that the same is true when purchase is made by condemnation, from the time when the judgment becomes final. The condemnor as purchaser of real estate is trustee for the purchase price from the date of such judgment until payment in full with interest has been made to the property owner. *Finn* v. *Wetmore*, 212 Ill. App. 550 at 553 and 554 and cases there cited. (See pages 44-45, below.)

The Circuit Court of Cook County has "original juris-

diction of all causes in law *and equity*" (Page 29 below). *Herb* v. *Pitcairn,* 392 Ill. 138. All courts have the positive duty to pass upon federal questions under the Constitutions: Article VI, paragraph 2 of the Constitution of the United States.

Your petitioner urges that said Appellate Court by its order and Opinion, and also the Circuit Court of Cook County and the Supreme Court of Illinois by orders without any opinion, abdicated constitutional duty to your petitioner, and refused just remedy and failed to review and pass upon the constitutional and federal questions presented by this record to all said Courts of Illinois.

That in so doing said Courts arbitrarily seek to change the fundamental personal and property rights of your petitioner under the bill of rights of the Constitutions of the State of Illinois and the United States, into mere matters at the grace and permission of the Courts of Illinois. Also to change the obligatory jurisdiction of the Courts of Illinois into merely discretionary jurisdiction. Thereby your petitioner was denied an obligatory hearing as to her vested rights, her contractual rights, and equal application of law, contrary to Article VI, paragraph 2 and the fifth and fourteenth amendments to the Constitution of the United States, and contrary to due process of law. *People* v. *Kelly,* 361 Ill. 54 at 59, 60; *Cities Service Oil Company* v. *Dunlap,* 308 U. S. 208 at 212. (See page 30 below).

The Bligh Report (1 Bligh N. R. House of Lords 312 ff) and *Warner* v. *New Orleans,* 167 U. S. 467 at 477; 175 U. S. 129-132, show how complete a departure from historic chancery, has been committed in this case at bar by the opinion and ruling of the Appellate Court. That historic chancery is shown by the petition to be embedded within the Constitution of Illinois by specific language set forth by the complaint in chancery and by this petition for certiorari.

The Supreme Court of Illinois has said in *Feldman* v. *City of Chicago*, 363 Ill. 247, 249 (assumpsit upon condemnation judgment):

> "The claim here was for a sum certain, depending only upon computation. Demand for interest was made at the time the judgment was paid. The amount of compensation was fixed by the judgment and the rate of interest was fixed by the Interest Act. No dispute could arise between the city and the property owner as to the amount to be paid, after the judgment became final and unconditional."

By section 32 of the Local Improvement Act of Illinois (Chapter 24: 84-32), the duty to pay the purchase price is unconditional from and after date when the judgment becomes final. Thereafter "no dispute could arise between the City and the property owners as to the amount to be paid." Petitioner says that by said provisions of the constitution, and by Section 1 of the Eminent Domain Act (Chapter 47), and by Section 30 of said Local Improvement Act, the taking does not become lawful and sufficient until payment has been fully made. It follows that all usual remedies by mandamus and in chancery are available to the property owner, as of course until his selling price with accruing interest, as determined by the judgment order and the Constitutions has been fully paid.

FEDERAL QUESTIONS.

Whether the Illinois courts by a mere assertion "plaintiff's theory of a trust as set forth in their briefs is without merit" may deny to your petitioner a fair hearing, a financial discovery, and faithful accounting of the trust fund, which is provided for by the constitutions of Illinois and the United States, as a substitute for the land; in this case, where petitioner has shown by her amended pleading in chancery, trial court, her right thereto as a constitutional beneficiary of said trust fund. (Rec. 13 ff).

Nature of Trust Relation.

While the trust relationship between trustee beneficiary and property usually arises from an interparty contract or from a covenant to stand seized, the method is immaterial and the fact of the relationship is the important element. In the case at bar we have exactly the same relationship with the same rights and duties created by the direction of section 42a of the Local Improvement Act of Illinois followed by assembly of the trust money and the judgment in condemnation and special assessment procedure which is shown by this record. The relationship being established, the substantive law of historic chancery and the procedural law of historic chancery inevitably govern the administration and performance of the trust relationship as so created.

The courts of Illinois are informed and capable to decide correctly upon constitutional questions.

In *People* v. *Loftus*, 400 Ill. 432, it was clearly stated that the Constitution of the United States and the decisions of the United States Supreme Court are the supreme law of the land, and binding on every court in the land. And in *People* v. *Nicholson*, 401 Ill. 546 at 553, it was said that "equal protection of the law" requires that the rights of every person must be governed by the same rule of law under similar circumstances, and a mere arbitrary discrimination between different classes is a denial of the equal protection of the law.

But in the case at bar the courts of Illinois failed to see or decide the constitutional wrong done to your petitioner. The City of Chicago pays interest to Garrett out of the same trust fund eleven years after payment of principal of the same judgment which gives rise to the claim by your petitioner. In the Illinois courts the City says orally by its brief, that such payment was upon a stipulation made

with Garrett. If true, that action only multiplies the wrong. No trustee may have secret deals with some of the beneficiaries to defeat the equal rights of all beneficiaries of the same trust. But the courts of Illinois accepted that tortious explanation.

THE MAIN QUESTIONS PRESENTED BY THIS PETITION.

Whether obligatory jurisdiction may be evaded and renounced by Illinois Courts, under our constitutional system of government.

Constitution of United States, Art. VI, paragraph 2:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Whether the Illinois Courts by renouncing obligatory jurisdiction with which they are vested by the Constitutions, can thereby evade ruling upon the record as to constitutional matters presented to them by your petitioner, so that thereby your petitioner has been denied her property under the bill of rights.

Whether an appellate court of Illinois may make that factual determination which is decisive of vital rights of petitioner, on a record where the crucial facts have not been developed by the Circuit Court of first instance because that court refused as a matter of law to order discovery and accounting as your petitioner prayed for in chancery. (Rec. 13)

Whether after joint condemnation and special assessment proceedings have taken land of your petitioner, by providing a special assessment fund as a substitute therefor, the condemnor may assert that its personal liability at

law, is a substitute for the trust fund right in equity of your petitioner, against the will of your petitioner and without any proceedings to condemn the trust fund, and contrary to the condemnation - special assessment joint judgment, which was entered by the County Court.

STATEMENT AS TO JURISDICTION OF THE COURT.

Petitioner suggests that the conduct here by the courts of Illinois and the opinion by the Appellate Court of Illinois by refusal to give effect to her count in chancery, are contrary to the constitutional rights of petitioner as announced by this court in *Brinkerhoff-Faris Trust and Savings Bank* v. *Hill*, 281 U. S. 673, following: and *Missouri, Kansas and Texas Railway Company* v. *Elliott*, 184 U. S. 530, at 533, following.

A parallel refusal by the courts of Texas to follow the established practice and procedure in that State was reversed by this court as a denial of due process of law. *Cities Service Oil Company* v. *Dunlap*, 308 U. S. 208, at 212.

Whenever it is apparent that the State court has tried to evade the real issue presented to it by the record for its decision, this court will make an independent examination of the issues. *Craig* v. *Harney*, 331 U. S. 367, at 373; *Urie v. Thompson*, 69 S. Ct. 1018 at 1026, and 1038.

Where it is shown by the record that the court of first instance failed to make the necessary factual determination which may be decisive of vital rights, (above page 2) this court will review and direct that a proper determination shall be made to place the crucial facts in the record. *Price* v. *Johnston*, 68 S. Ct. 1049, at 1063; 334 U. S. 266 at 291.

This court will reverse whenever the courts, whose ruling is under review, have failed to follow the established procedure and practice, applicable to the record brought to this court.

Separateness of Chancery Procedure in Illinois

The separateness of chancery by complaint and procedure in Illinois as developed by legal history, is established by the Constitution of Illinois (Page 29 below) and is confirmed by § 31 of Civil Practice Act and Rules 11 and 12 made by the Supreme Court at Illinois. (Ill. Rev. Statutes Chap. 110 § 155, 259.11 and 259.12).

DEPARTURE FROM ESTABLISHED LAW.

Petitioner comes here with her record whereby the courts of Illinois by decree, and the Appellate Court of Illinois for the First District, by its opinion, make departure from the established practice and procedure of historic chancery, as disclosed by the settled decisions of Illinois and national courts prior to the time of this suit.

Those decisions by the Supreme and Appellate Courts of Illinois during many decades before this case, necessarily became an established part of the constitutional rights of your petitioner. The sudden departure by the courts of Illinois in the instant case is not a construction or interpretation of any statute or constitution, but is in fact nothing more nor less than an outright seizure by the court of power, and an arbitrary denial of Federal constitutional rights vested in your petitioner as herein stated.

By paragraph 7 of the count in chancery (Rec. 17) it is shown that respondent City of Chicago, sixteen years after judgment and eleven years after the principal of the judgment has paid to another beneficiary of the trust fund interest similar to that which your petitioner has demanded by the present suit. It is a denial of equal protection of the law and pure favoritism when the City of Chicago, recognizing the right to interest on the part of one beneficiary, refuses the equal and coordinate right of your petitioner, another beneficiary.

Statutory Basis for Certiorari

Timely application for review by this court, is made by presenting and filing the record and this petition for writ of certiorari. The petition is prepared pursuant to section 1257(3) of the new Federal Judicial Code (old code section 237b) and rule 38 of the Supreme Court as amended.

The petition and record are presented and filed in this court within ninety days after May 12, 1949 when the Supreme Court of Illinois denied our petition for leave to appeal. § 2101(c) of New Federal Judicial Code.

PRAYER FOR RELIEF.

Your petitioner submits that she did not receive due process of law or equal protection of the law in the courts of Illinois in this case. The action of the Circuit Court and Appellate Court and Supreme Court of Illinois took away her vested property rights in the trust fund, by arbitrary and capricious decision. That action is such as to call for review and reversal by the Supreme Court of the United States.

WHEREFORE, petitioner prays the allowance of a writ of certiorari to the Appellate Court of Illinois, First District, to the end that the cause herein may be reviewed and decided by this court and that the decrees and orders herein may be reversed and for such relief as this court may direct.

GEORGE A. MASON,
GEORGE A. MASON, JR.,
WEIGHTSTILL WOODS,
Attorneys for Petitioner.

GEORGE A. MASON,
GEORGE A. MASON, JR.,
WEIGHTSTILL WOODS,
Of Counsel.

SUPPORTING BRIEF FOR PETITIONER

I.

A.

The ruling and judgment of circuit court without an opinion, and the affirmance and opinion by Appellate Court of Illinois, and ruling by Supreme Court of Illinois without opinion, constitute a persistent refusal to recognize or grant any fair hearing to petitioner Cunningham upon her amended complaint in chancery filed by her April 15, 1948.

The primary duty owed by every trustee, discovery and accounting for trust fund shown by this record (Page 15 above), was refused and denied by the Illinois Courts. (Page 27 below).

Brinkerhoff-Faris Trust & Savings Bank v. *Hill*, 281 U. S. 673 ff.

Missouri, Kansas and Texas Ry. Co. v. *Elliott*, 184 U. S. 530 at 533 ff.

B.

Whenever it is apparent from the record that state courts have evaded the real issues presented by the record, this court will make an independent examination of record issues, and will give directions to enforce due process of law and equal application of law as provided by the Fourteenth Amendment to the Constitution of the United States. (Page 28 below).

Craig v. *Harney*, 331 U. S. 367 at 373.

C. B. & Q. Ry. Co. v. *City of Chicago*, 166 U.S. 226 at 241.

Urie v. *Thompson*, 69 S. Ct. 1018 at 1026 and 1038; 337 U. S. 163 at 172 and 187.

C.

A parallel refusal by the courts of Texas to follow the established practice and procedure in that state was reversed by this court as a denial of due process of law. (Page 30 below).

Cities Service Oil Company v. *Dunlap*, 308 U. S. 208 at 212.

II.

A.

As shown by her amended complaint in chancery filed April 15, 1948, in the Circuit Court of Cook County, by the joint condemnation and special assessment judgment and decree entered by defendant City of Chicago on June 9, 1926, against itself, your petitioner was endowed with the security of a trust fund for her compensation provided for by the constitution, in payment and exchange for the forcible taking of her land from her by eminent domain proceedings. (Page 34 below).

Section 42a of Local Improvement Law of Illinois and eminent domain provisions of the constitution.

B.

By current and historic chancery in Illinois established by the constitution and confirmed by statute, your petitioner is endowed with full right to have from defendant City of Chicago as trustee, a fair hearing, substantial discovery and faithful accounting of the trust fund provided as substitute for the land, as she has shown by her amended pleading. (Page 36 below).

Smith v. *Bates Machinery Co.*, 182 Ill. 166 at 168.
Hobbs v. *Monarch Ref'g. Co.*, 277 Ill. 326.
Goss-Puterbaugh Chancery (1940) § 483 at page 789 ff.
Street v. *Thompson and others*, 229 Ill. 613.
Branigar v. *Village of Riverdale*, 396 Ill. 534.
Callner v. *Greenberg*, 376 Ill. 212, at 215.

C.

Section 42a creates a fund for the express purpose of paying the full and just compensation for land condemned and taken (Pages 3, 8, 22, 38, herein).

This is a trust fund for the protection of the owner of the land taken for the improvement.

The pertinent provisions of Section 42a of the Local Improvement Act in force in 1926 and 1927 are as follows:

> "* * * So much of the aggregate amount assessed as represents the compensation for property to be taken or damaged, together with the cost of making and collecting the special assessment or special tax * * * *shall be apportioned to the first installment of the special assessment or special tax.* * * * *All installments shall bear interest until paid at the rate of six (6) per cent per annum.*" (Italics ours.)

The section requires compensation for land taken to be apportioned to the first installment. In such case payment of the award should be made out of this installment.

People v. *Smart*, 333 Ill. 135, 138.

Cohen v. *City of Chicago*, 377 Ill. 221, 230.

Where there are no installments the entire assessment is a trust fund to pay for land taken and the cost of constructing the improvement. The ordinance at bar did not divide the assessment into installments.

Special assessments pledged for specific purposes are trust funds.

Siefker v. *City of Chicago Heights*, 297 Ill. App. 113.

People ex rel. First National Bank of Stevens Point, Wisconsin v. *Village of Stickney*, 312 Ill. App. 179.

Village of Lansing v. *Sundstrom*, 379 Ill. 121.

People v. *Smart*, 333 Ill. 135.

Rothschild v. *Village of Calumet Park*, 350 Ill. 330.

Chicago Flower Growers, Inc. v. *City of Chicago*, 306 Ill. App. 571 and 316 Ill. App. 153.

Conway v. *City of Chicago*, 237 Ill. 128.

Gray v. *Town of Thermopolis*, 33 Fed. Supp. 77.

5 McQuillan Mun. Corps. (2d ed.) 426, sec. 2095.

The rebate or surplus fund provided for in section 93 of the local improvement act is an express trust fund, not an implied trust fund, for the benefit of assessees.

Flanagan v. *City of Chicago*, 311 Ill. App. 135.

Site of Fort Dearborn Building Corporation v. *City of Chicago*, 318 Ill. App. 139.

The fund created by section 42a to pay the property owner for land taken is, *a fortiori*, a trust fund for his benefit.

Restatement of the Law of Trusts, § 12 and § 219.

Reighly v. *Continental Illinois National Bank & Trust Company*, 390 Ill. 242 at 254.

Merchants National Bank of Aurora v. *Frazier*, 329 Ill. App. 191 at 201.

III.

A.

Interest on the award after delay in payment is necessary to constitute just compensation under the Illinois and U. S. Constitutions. (Page 42 below.)

Just compensation for property presently taken must necessarily mean its present value presently paid. It cannot mean its present value to be paid in the future without interest. If payment is not to accompany the taking but is to be postponed to a later date it must certainly be upon the payment of interest for the deferred period.

Mecartney v. *City of Chicago*, 273 Ill. 276, and cases therein cited.

Delay in paying the award without interest defeats the constitutional provision for just compensation.

People ex rel. Wanless v. *City of Chicago*, 378 Ill. 453, 459.

Feldman v. *City of Chicago*, 363 Ill. 247.

Illinois Constitution, Sec. 13, Art. 2.

The United States Supreme Court rule is the same.

Seaboard Air Line R. Co. v. *United States*, 261 U. S. 299.

United States v. *Creek Nation*, 295 U. S. 103.

Shoshone Tribe v. *United States*, 299 U. S. 476.

Phelps v. *United States*, 274 U. S. 341.

Jacobs v. *United States*, 290 U. S. 13.

United States Constitution, Fifth Amendment.

The landowner's right to such additional compensation rests on the constitution. The Interest act affords merely a convenient yardstick to measure the additional allowance to which he is entitled under the constitution. It is immaterial whether this allowance is called interest or additional compensation. It derives from the constitutional provision for just compensation. *Wanless, Mecartney* and *Feldman* cases, *supra.*

The Interest act does not control *the right of the owner* to further compensation. It merely measures the value of that right in terms of money.

No statute and no decision can limit or reduce the right of the owner which is created by the Constitution to receive just compensation in a court which administers due process of law and makes an equal application of law and the Constitution.

B.

The owner of land taken or damaged has an absolute right to damages whenever his property is taken or damaged for public use. This is a vested property right.

He cannot be divested of that right under the guise of a statute of limitations. Statutes of limitation affect only the remedy. They cannot impair or destroy vested constitutional rights. (Page 44 below.)

People v. *Smith*, 374 Ill. 286, 288.
Smith v. *Toman*, 368 Ill. 414, 420.
People v. *Kingery*, 369 Ill. 289.
Ettor v. *Tacoma*, 228 U. S. 148, 157.
Illinois Constitution, Sec. 13, Art. 2.

ARGUMENT FOR PETITIONER.

I.

A.

The ruling and judgment of the circuit court without an opinion, and the affirmance and opinion by Appellate Court of Illinois, and ruling by Supreme Court of Illinois without opinion, constitute a persistent refusal to recognize or grant any fair hearing to petitioner Cunningham upon her amended complaint in chancery filed by her April 15, 1948.

In the opinion of the Appellate Court of Illinois for the First District discussing the judgment brought there for review, that court baldly says:

> "Plaintiffs theory of a trust as set forth in their briefs is without merit".

A similar assertion and ruling made in a case which came up from the Kansas City Court of Appeals was met with an order for reversal after examination of the record by this court.

Missouri, Kansas and Texas Railway Company v. *Elliott*, 184 U. S. 530 at 533 ff, Law Ed. 673 at 676 1902.

Brinkerhoff-Faris Trust and Savings Bank v. *Hill*, 281 U. S. 673 ff.

That statement by the Appellate Court of Illinois, ignores and refuses to face the count in chancery which is the important part of the complaint on which your petitioner relies.

"Whether petitioner does or does not have any new information is a matter unrevealed by anything before us or before the Circuit Court of Appeals. It is a matter which should be determined in the first instance by the District Court. And it is one on which petitioner is entitled to be heard either at a hearing or through an amendment or elaboration of his pleadings. Appellate courts cannot make factual determinations which may be decisive of vital rights where the crucial facts have not been developed. *Cf. Kennedy* v. *Silas Mason Co.*, 334 U. S. 249, at 257."
Price v. *Johnston*, 334 U. S. 266 at 291.

That ruling applies precisely to the bald determination by the Appellate Court of Illinois "Plaintiffs theory of a trust as set forth in their briefs is without merit". This determination of fact is made without the discovery and accounting for which petitioner asked in her amended complaint and has never had any hearing. (Rec. 13-21)

B.

Whenever it is apparent from the record (Rec. 24-31) that state courts have evaded the real issues presented by the record, this court will make an independent examination of record issues, and will give directions to enforce due process of law and equal application of law as provided by the Fourteenth Amendment to the Constitution of the United States.

The affidavit for defendant is directed only against the count for debt. The affidavit is limited to payment of the principal of the award. The affidavit does not controvert the essential claim for interest in either count. The affidavit does not deny the creation nor existence of the trust set forth by the amended complaint. The affidavit does not suggest any defense to claim for discovery and for account-

ing in equity. The complete failure to deny is an admission that the trust was created, that it exists, that the defendant remains as trustee, and that plaintiff is a beneficiary of that trust so far as accrued interest is part of just compensation.

By Article VI Section 12 of the Constitution of Illinois ("The circuit courts shall have original jurisdiction of all causes in law and equity") and by section 1 of chapter 22 of Illinois Statutes ("according to the general usage and practice of courts of equity") the trial court in this case is vested with historic powers and duties that pertain to the High Court of Chancery. By the current and historic chancery practice and procedure, the court is always open by original jurisdiction to order full discovery and accounting as to any fund from which plaintiff is to be paid.

Street v. *Thompson and others*, 229 Ill. 613.
Branigar v. *Village of Riverdale*, 396 Ill. 534.

The power and duty of a court of chancery to order discovery and accounting is often used in local improvement cases where claim is made by bond owner creditors against special assessment funds.

Chicago Flower Growers, Inc. v. *City of Chicago*, 306 Ill. App. 571.
O'Laughlin Company v. *Village of Stickney*, 291 Ill. App. 606.
Cook v. *City of Staunton*, 295 Ill. App. 111.

The refusal by the trial and review courts in this case to sustain the claim made in equity by the amended complaint, and failure to order full discovery and accounting, is a denial of the usual and due process of law and equal application of law which, as shown above, is the established practice and procedure in the State of Illinois, and commonly applied to other litigants. The refusal to apply that

practice and procedure against the city of Chicago in this case is arbitrary discrimination, and refusal to open the door of justice at all for this plaintiff.

A like ruling which met with reversal by this court was made in a case which came from the Kansas City Court of Appeals in Missouri.

> *Missouri, Kansas and Texas Railway Company* v. *Elliott*, 184 U. S. 530 at 533 ff. Law Ed. 673 at 676.

In the case at bar the court baldly says:

> "Plaintiffs' theory of a trust as set forth in their briefs is without merit".

That statement ignores and refuses to face the count in chancery which is the important part of the complaint on which plaintiff relies.

Whenever it is apparent that the State court sought to evade the real issues presented to it for decision, this court will make an independent examination of the issues and the facts.

> *Craig* v. *Harney*, 331 U. S. 367 at 373.
>
> *Chicago, Burlington & Quincy Railroad Company* v. *City of Chicago* 166 U. S. 226 at 241.

C.

A parallel refusal of the Courts of Texas to follow the established practice and procedure in that state was reversed.

> *Cities Service Oil Company* v. *Dunlap*, 308 U. S. 208 at 212 (1939).

The Supreme Court there said:

> "We cannot accept the view that the question presented was only one of practice in courts of equity. Rather we think it relates to a substantial right upon which the holder of recorded legal title * * * may confidently rely."

By this petition we seek such an independent examination of the case made for petitioner by the record in the trial court.

Urie v. *Thompson*, 69 S. Ct. 1018 at 1026 and 1038.

The trust fund is security and substitute for the land taken by the condemnation proceeding. It is a personal property right. That right can be disposed of only under the law of trusts. It is not claimed by the city of Chicago that this trust has ever been repudiated. Until that has been done there cannot be any application of any statute of limitations.

"In our opinion, a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the state or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in due process of law required by the 14th Amendment of the Constitution to the United States, and the affirmance of such judgment by the highest court of the state is a denial by that state of a right secured to the owner of that instrument."

C. B. & Q. R.R. v. *City of Chicago*, 166 U. S. 226, at 241.

The statement by respondents in this Court, and before the State Courts, is one of confession. They admit the correctness and truth of our complaint and our petition. In this Court and in the State Courts, they have sought an avoidance by ignoring the nature and effect of the pleadings in the record and by contending the Courts must decide in favor of respondents, without any regard for the language of the pleadings in equity and the petition here by the plaintiffs.

Restatement of the Law of Trusts, ¶91, 12, 198, 199, 219.

Respondents Wish to Denature This Equity Suit.

The plaintiffs raised constitutional issues by the complaint in chancery in the trial court, and reasserted the same, by all the briefs that were filed in each of the Illinois Courts, and by our petition now before this Court. The City of Chicago and the Courts of Illinois deny to us due process of law and equal protection of law, by their words of bold assertion which seek to denature our suit from being one in chancery into becoming exclusively a suit at law, basically different in its nature.

Petitioner has shown by this record that she did *not* receive any day in Court, *on the case in chancery made by her pleadings.* Under Illinois Laws and its Constitution, petitioner was entitled to a hearing upon her property rights in equity before the Courts of Illinois, upon her pleadings in chancery. This right has been ignored and refused, by the action of those Courts, as we have shown by the record.

This Court has many times stopped the destruction of citizen rights, attempted by one or another form of either direct or indirect evasion. In the case at bar, we have shown an attempt to destroy our property rights by circumvention. Respondent persuaded the courts of Illinois to suppose and to decide a case at law, whereas the facts set forth by the complaint establish a case of historic chancery, which is entitled to claim and to receive from this court, the protection of the Fourteenth Amendment to the Constitution of the United States.

The respondent and the Courts of Illinois in the case at bar would erase entirely so far as petitioner is concerned, both the right and procedure of chancery or equity.

They Advocate Judicial Repeal of the Constitution.

The right of petitioner is not merely procedural. It is also a substantive right of property under the Constitution.

Potter v. *Couch*, 141 U. S. 296 at 320.

Illinois courts in *Maloney* v. *City of Des Plaines*, 303 Ill. App. 233; *Markman* v. *Calumet City*, 297 Ill. App. 531; *Bankers Life Company* v. *Chicago Park District*, 318 Ill. App. 214; *Roberts* v. *Village of Lyons*, 307 Ill. App. 36, and many other cases, have ruled that statutes of limitation in these special assessment matters cannot be applied until after the municipality has definitely shown that it has funds available and offers payment. The contrary fact of refusal to make payment, is established by this record. The City of Chicago does not so proceed. It merely asserts there is some statute of limitation. Defendant fails to specify any statute. The facts are not shown by the defense and do not exist, which are necessary to start the running of any Statute of Limitation. *White* v. *Sherman*, 168 Ill. 589 at 605. Notice of disclaimer and repudiation of trust are indispensable to start running of time for limitation.

The foregoing Federal questions are of such general public importance, and are particularly of such grave personal importance to your petitioner, that they should be reviewed by this Court. Particularly is that so because the rulings made by the courts of Illinois on this record seem to be in clear conflict with decisions and rulings previously made by this Court. (See above pages 27ff.)

The equal protection of laws is a pledge of protection of equal law.

State of Missouri ex rel Gaines v. *Canada*, 305 U. S. 337 at 350.

The primary duty is obligatory upon all courts, both state and national, to hear and determine constitutional

questions and federal questions, which are presented by the record.

Article VI of the Constitution of the United States (Second Paragraph).

Conway v. *Cable*, 37 Ill. 82 at 90.

West Chicago Street Railway Co. v. *Illinois ex rel. Chicago*, 201 U. S. 506 at 519-520.

Coombes v. *Getz*, 285 U. S. 434.

II.

A.

As shown by her amended complaint in chancery filed April 15, 1948, in the Circuit Court of Cook County, by the joint condemnation and special assessment judgment and decree entered by defendant City of Chicago on June 9, 1926, against itself, your petitioner was endowed with the security of a trust fund for her compensation provided for by the constitution, in payment and exchange for the forcible taking of her land from her by eminent domain proceedings.

The separateness of Chancery by complaint and procedure in Illinois as developed by legal history, is established by the Constitution of Illinois (page 29 above) and is confirmed by § 31 of Illinois Civil Practice Act and by Rules 11 and 12 made by the Supreme Court of Illinois (Ill. Rev. Statutes, Chap. 110; §§ 155, 259.11 and 259.12).

Defendant City of Chicago by entering final judgment confirming the assessment roll on June 9, 1926, (Rec. 15) which assessed the City of Chicago $228,766.38 for that improvement, made itself at that date trustee of that sum as part of the trust fund for payment to plaintiff as one owner of real estate taken by that condemnation proceeding (Exhibit A to amended complaint, Rec. 21); and undertook to collect the balance of the assessment viz., the sum of $215,593.62, which was assessed against others than the City of Chicago. The right, power and duty of City of Chicago as such trustee so to do, are shown and established

by the amended complaint in equity (Rec. 16ff). The defendant made no denial whatever of the foregoing.

On the contrary, the affidavit for defendant (Rec. 24-31) shows affirmatively that only the principal of the award was paid and

> "The defendant, City of Chicago, has neither made any payments on account of interest or made any promises to pay any interest on said condemnation award or judgment since the date of payment of said award." (Rec. 25)

The contention by the city as stated by the Appellate Court in the case of *Boal* v. *City of Chicago,* 330 Ill. App. 614 is

> "that plaintiff is neither a holder of bonds issued in anticipation of collections of special assessments nor an assessee who claims a surplus in certain funds over and above the cost of completing local improvements; that no case can be found in this State holding that the municipality stands in a trust relationship to a judgment creditor, who is not limited to any particular fund nor limited to a distributive share in any fund; that the judgment in the instant case, if the claim is not barred by the statute, is an absolute liability of the municipality payable in full and at all events; that the city's resistance to plaintiff's claim is not on the basis that there is not sufficient money in some fund with which to pay the claim for which reason the claim falls; that the defense is that the claim for interest is barred by the statute of limitations; that if it is not barred the full taxing power of the city should be called upon to accomplish payment of the claim."

That contention is that if a trustee is also liable personally, a claimant must pursue the personal liability or he loses his claim against the trust fund. That simply never was the law anywhere. No claimant is compellable by the holder of two funds to say which the claimant will pursue. (*Boone* v. *Clark,* 129 Ill. 466 at 480) Only an adverse claimant to one of the funds may do that. The defense of waiving a claim against one of the funds, cannot possibly be applicable to the right of payment from the

remaining trust fund. Especially where as here the fundamental constitutional law of eminent domain requires that fund as a substitute for property taken by force from the citizen. To say as the city does that an assessee may recover from the trust fund, and that a bondholder may recover from the trust fund, but that the owner who loses his real estate by forcible condemnation may not do so, would defeat the fundamental nature of constitutional protection for property, which is shown by this petition.

B.

By current and historic chancery established by the constitution and confirmed by statute, your petitioner is endowed with full right to have from defendant City of Chicago as trustee, fair hearing, substantial discovery and faithful accounting for the trust fund provided as substitute for the land, as she has shown by her amended pleading in chancery. (§ 31 of Civil Practice Act).

In *Pease* v. *Kendall,* 391 Ill. 193 at 197 the Court ruled:

> "Courts of equity have paramount jurisdiction in the settlement of trust estates and may even control courts of law in their action in that regard. *Grattan* v. *Grattan,* 18 Ill. 167, 65 Am. Dec. 726; 1 Story's Eq. Juris, chap. 9; Williams on Executors, pp. 1239 and 1240. It is evident from the pleadings that a dispute had arisen as to who is entitled to the property belonging to the estates of John H. and Edwin A. Pease. It is also clear from the facts shown that a necessity existed to safeguard and preserve the assets of the estate of John H. Pease and prevent waste until his will and that of his son could be construed. A court of equity has paramount jurisdiction in such a situation. *Curtiss* v. *Brown,* 29 Ill. 201."

See above pages 18 and 34. *Cummings* v. *Smith,* 368 Ill. 94 at 104ff. reaches the same conclusion that *equity jurisdiction is paramount over the law action.*

Section 48 of the Civil Practice Act of Illinois (Ch. 110, par. 172) provides for involuntary dismissal for certain

defects of complaint. That section of the statute reads in part as follows:

> "Defendant may, within the time for pleading, file a motion to dismiss the action or suit, where any of the following defects appear on the face of the complaint, *and he may within the same time, file a similar motion supported by affidavits* where any of the said following defects exist but do not appear upon the face of the complaint."

Affidavit for City of Chicago

The affidavit for defendant in the suit at bar does not purport to cover or support points 2 to 8 inclusive of defendant's motion. Those points relate to Count II of the complaint in chancery. The affidavit makes no reference or statement as to any matter of trust fund or trust estate, other than to admit that the principal of the award was paid out of the assessment trust fund. Consequently the affidavit for defendant does not support points 2 to 8 inclusive of the motion for defendant, and those points are void and invalid because not supported by affidavit as the statute provides. Furthermore the affidavit to the amended complaint by the plaintiff (Rec. 20) is full, complete and positive support to the amended complaint and trust fund. Under these circumstances no defense whatever is made against the amended complaint. Thereby plaintiff is entitled to her judgment on the face of the record. (Rec. 22)

No denial is made of the condemnation-assessment roll joint judgment on June 9, 1926, (Rec. 15). Defendant admits payment out of that special assessment warrant (Rec. 17 and 26 to 29). This suit seeks enforcement of that judgment to the extent of interest accruing thereon from that date to the dates when the principal award was paid to the plaintiff. The defendant resists payment of that accrual of just compensation.

The only purpose of having courts and making judgment is to have the order of the court enforced. Recently

the Supreme Court of Illinois enforced a judgment obtained against a citizen of Illinois on service of notice from Daviess County, Indiana. *McCallum* v. *Baltimore and Ohio Railroad Company,* 379 Ill. 60. Which is all the more reason why Illinois courts should enforce performance of the trust res special assessment fund established by the judgment of June 9, 1926. The defendant makes no claim to any dissolution or termination of that trust fund.

C.

Section 42a of the Local Improvement Act creates a fund for the express purpose of paying full and just compensation. This is a trust fund for the protection of the owner of the land taken for the improvement and the Statute of Limitations is not applicable to such a fund.

The section provides a new and distinct mode of financing the cost of a local improvement where the ordinance combines construction and the acquisition of land necessary therefor.

The section finances both land and construction costs out of the special assessment provided for in the section. In this respect it is unique. There is no other section in the Local Improvement Act like it. The legislature intended the assessment to be a trust fund to pay for land taken and the cost of construction.

The section also provides for the collection of interest on all installments, and this interest is a part of the trust fund.

The controlling decision of *People* v. *Smart,* 333 Ill. 135 (1928) construes and interprets section 42a. This case has never been modified or overruled.

In the *Smart* case, this Court held, at page 137:

> "While Section 42a gives to municipalities in a combined proceeding for the construction of an improvement and the taking of property therefor, the

power to spread the cost of construction in ten installments, it specifically requires the compensation for property taken to be apportioned to the first installment, thus providing a fund available for the purpose of paying compensation for property taken within thirty days after the entry of order of confirmation, at which time the first installment becomes due and payable. *The fund for the payment of compensation having been thus provided for by the first installment, it would seem logical to follow that payment of awards of property should be made out of this fund.*" (Italics ours.)

This ruling that the proceeds collected on the first installment constitute a special fund for the benefit of the owner of the property taken was repeated, approved and the principle followed by the Supreme Court in *Cohen* v. *City of Chicago,* 377 Ill. 221, at pages 230-231.

The *Smart* case was repeatedly called to the attention of the Appellate Court in the *Boal* case and in the instant case. No reason was assigned in the opinion in either case for ignoring the Smart holding.

We quote from *Town of Cicero* v. *Green,* 211 Ill. 241, at 246:

"Appellees also contend that the interest on the contractor's vouchers, amounting to $9,045.80, cannot be considered part of the cost of the improvement, and that there is no deficiency unless it is based upon that item. The stipulation was that the entire amount of the original assessment was collected, and that it amounted to $56,122.83. Section 55 of the act provided for dividing the assessment into installments, the first of which should not exceed 25 per cent of the assessment, and the remaining portion to be divided into four equal installments, bearing interest at the rate of 6 per cent per annum. 1 Starr & C. Ann. St. p. 781. Section 63 provided that the vouchers should bear the same rate of interest as the installments, and it was intended that the interest on the installments and the interest on the vouchers should equal each other. The total amount

collected, according to the stipulation, necessarily included the interest, and, *where payments are deferred, the interest is as much a part of the cost of the improvement as the principal.* The contractor is as much entitled to the interest on the voucher as he is to the principal. *People* v. *City of Chicago,* 152 Ill. 546. *In case of a partial payment upon an interest-bearing obligation exceeding the interest, the payment is first applied to satisfy the interest due, and the balance on the principal. The cost of the improvement is the total amount paid for it, and whatever remains unpaid is a deficiency.*" (Italics ours.)

This statement of law as to *inclusion of interest as part of the fund which is security* for a contractor who takes bonds as payment for his work upon a public improvement, is all the more true as to an owner whose real estate is taken from him by court in condemnation proceedings. The present suit seeks a like accounting and an equal security and payment of judgment entered as compensation for real property taken for a public improvement. Due process and just compensation so require under State and National Constitutions, as set forth throughout this record.

In its opinion in the instant case the Appellate Court considered as controlling its decision in the *Boal* case (330 Ill. App. 614). In that case the court referred to *Trust Co. of Chicago* v. *City of Chicago,* 327 Ill. App. 222 and by that plaintiff, plaintiff's mention *arguendo,* of section 42a in its "Supplemental Citations and Suggestions" filed therein. The court's opinion in the *Trust Co.* case did not refer to section 42a, nor did the appellee city mention or argue the section either in the Appellate Court or in responding to the Trust Company's petition for leave to appeal to the Supreme Court of Illinois (denied, 391 Ill. 629).

The facts are that the *Trust Company* case was not brought under Section 42a, as is the instant case, and that in the *Boal* case the Supreme Court of Illinois was pre-

cluded from passing on appellant's contentions regarding the section because the required jurisdictional amount for a petition for leave to appeal to that court was lacking and the Appellate Court denied a petition for the issuance of a certificate of importance to the Supreme Court of Illinois.

It appears that the city is unwilling to meet the issues raised by petitioner. This may be due in part to the fact that in the instant case the city paid interest on the condemnation judgment to petitioner's sole co-defendant in the condemnation proceedings *more than fifteen years after the entry of the judgment* (Abst. 17; Rec. 23), and more than eleven years after payment of the face of the judgment.

In *Site of Ft. Dearborn Bldg. Corp.* v. *City of Chicago,* 318 Ill. App. 139, the same principle here involved was presented. In the *Ft. Dearborn* case, an assessed landowner claimed his rightful share of a surplus over and above the cost of the improvement remaining in the special assessment fund. The City of Chicago contended as in the present case, and among other grounds, that the claim was barred by the statute of limitations. The court held, however, that these local improvement funds were trust funds, and therefore the statute did not apply (318 Ill. App. 144), following the prior express ruling of the court in *Flanagan* v. *City of Chicago,* 311 Ill. App. 135, at page 155. The holding in the *Flanagan* case was likewise expressly based upon the uniform and repeated rulings of the Supreme Court in *Conway* v. *City of Chicago,* 237 Ill. 128, and *Rothschild* v. *Village of Calumet Park,* 350 Ill. 330.

A fortiori, the owner of land condemned and taken by the city is the primary beneficiary of the special assessment trust fund created to finance the improvement, and the statute of limitations cannot bar his recovery of full and just compensation.

III.

A.

Interest on the award after delay in payment is necessary to constitute just compensation under the Illinois and U. S. Constitutions.

Delay in payment of the condemnation judgment without interest is a denial of just compensation to the property owner and is contrary to the provisions of both the Federal and the Illinois Constitutions.

Illinois Constitution of 1870, Art. II, Sec. 13.

United States Constitution, Fourteenth Amendment.

The owner of property taken or damaged is also given a constitutional lien for the payment of just compensation.

Epling v. *Dickson,* 170 Ill. 329, 333.

Illinois Constitution of 1870, Art. II, Sec. 13.

A lien based on the constitution cannot be impaired or destroyed by the legislature.

The *Mecartney* case, 273 Ill. 276, the *Feldman* case, 363 Ill. 247, and the *Wanless* case, 378 Ill. 453, hold squarely that the award fixed by the judgment is not just compensation where only the face amount of the judgment is paid at a later date without interest.

In the *Mecartney* case, this court ruled that; (273 Ill. 276, at p. 281)

> " 'Just compensation for property presently taken must necessarily mean its present value *presently paid. It cannot mean its present value to be paid two years in the future without interest. If payment is not to accompany the taking but is to be postponed to a later period it must certainly be upon the payment of interest for the deferred period.*" (Italics ours.)

The same rule was restated in *Feldman* v. *City of Chicago,* 363 Ill. 247, where the Supreme Court held: (p. 253)

> "Where there is delay in the payment of a condemnation judgment it cannot reasonably be said that its payment at some later date will amount to just compensation, because the owner in such cases is deprived of the full and beneficial use and enjoyment of his property without legal process or compensation. * * * *the constitutional right of one deprived of the full use of his property to receive full compensation therefor and interest during the period of time this compensation is withheld*—is well settled in almost all of the States." (Italics ours.)

In *People ex rel. Wanless* v. *City of Chicago,* 378 Ill. 453, at pp. 458-59, the Supreme Court again restated and reaffirmed this well settled constitutional ruling.

Not only the Illinois Constitution, but also the United States Constitution has uniformly been held to vest in the property owner the constitutional right to interest upon the condemnation award during the period it is withheld, as an essential element of "just compensation." Thus in *Seaboard Air Line R. Co.* v. *United States,* 261 U. S. 299 (1922), the United States Supreme Court stated: (p. 306)

> "The addition of interest allowed by the District Court is necessary in order that the owner shall not suffer loss and shall have 'just compensation' to which he is entitled."

This federal rule, under the Fifth Amendment to the United States Constitution is well settled and long established. (*U. S.* v. *Creek Nation,* 295 U. S. 103; *Shoshone Tribe* v. *U. S.,* 299 U. S. 476; *Phelps* v. *U. S.,* 274 U. S. 341; *Jacobs* v. *U. S.,* 290 U. S. 13.)

B.

The owner of land taken or damaged for public use has an absolute right of compensation therefor. This is a vested, constitutional property right and cannot be divested under the guise of a Statute of Limitations.

The owner of land taken has a vested property right in the compensation awarded for property taken or damaged for a public improvement.

People v. *Smith*, 374 Ill. 286.
Ettor v. *Tacoma*, 228 U. S. 148.

In the *Smith* case (374 Ill. 286) the Illinois Supreme Court stated (p. 288):

> "Section 13 of Article 2 of the Illinois Constitution makes absolute the right of a landowner to damages when his property is taken or damaged for public use. It makes no difference whether the damages are ascertained before or after the injury is inflicted. (*People* v. *Kingery*, *supra*, (369 Ill. 289), at page 293). This is a vested property right. *Ettor* v. *Tacoma*, 228 U. S. 148, 157, 57 L. ed. 773, 779." (Italics ours.)

In *Ettor* v. *Tacoma*, 228 U. S. 148, the United States Supreme Court likewise held that the right of the landowners whose property is taken or damaged to compensation is a vested property right. The Court held further that this vested right was fully protected, under the Fourteenth Amendment to the U. S. Constitution, from destruction by a repeal of the compensatory provision after the damage is done.

It is thus clear that the constitutional right of appellant in the present case to all the essential elements of "just compensation," including interest on the award during the period its payment is withheld, is a vested property right which cannot be divested by invoking the provisions of a

mere procedural and remedial statute, as that of limitations.

Statutes of limitations affect only the remedy. They cannot destroy substantive rights. *People* v. *Smith*, 374 Ill. 286, 288; *Smith* v. *Toman*, 368 Ill. 414. Restatement of the Law of Trusts, §§ 12 and 219.

Furthermore without regard to mere procedural requirements, this suit is brought as a cause of action for the enforcement of a trust duty and obligation, voluntarily undertaken and assumed and carried on by the City of Chicago. Against such trust obligation in equity, there exists in Illinois, no statute of limitations. *C. & E. I. Ry. Co.* v. *Hay*, 119 Ill. 493 at 502.

Appellant is entitled to recover both on the theory of a trust fund and on the ground that she has a vested property right in just compensation which requires an additional allowance where there has been a year and a half's delay, as in this case, in payment of the judgment.

Call it what you will, interest or additional compensation, she has not received full compensation for her property. To deny the allowance of interest or its equivalent is to deny full and just compensation to the property owner contrary to the provisions of the Illinois constitution which prohibits the taking of private property for public use without just compensation.

The *Turk* case, 352 Ill. 171, held that the Interest Act embraces a condemnation judgment which is essentially a *quod recuperet* judgment. That is sound doctrine but it does not exclude the rule announced by Mr. Justice Cartwright in the *Mecartney* case. In later cases emphasis was shifted by the court to the Interest act as a source of additional compensation after delay in payment of the judgment. In doing that the constitution, as the real basis for an additional allowance, was disregarded by the Illinois Courts in suits brought at law.

CONCLUSION FOR RELIEF.

The fundamental and basic constitutional rule, however, is that laid down by the Illinois Court in the *Mecartney* (273 Ill. 276), *Feldman* (363 Ill. 247) and *Wanless* (378 Ill. 453), cases, namely, that delay in the payment of a condemnation judgment, without interest, defeats the constitutional provision for just compensation.

No procedural or remedial statute, such as the statute of limitations, can divest the property owner's right to receive such full and just compensation. No statute for such a purpose ever existed in Illinois.

The general law is that a trust is free from time limitations, and must be administered by a court of chancery, when the beneficiary seeks relief. That is also the law of Illinois.

> Restatement of the Law of Trusts, §§ 125, 198, 199, 219.

Your petitioner submits that she did not receive *due process* of law nor *equal protection* of the law, in the Courts of Illinois in this case. The action of Circuit Court, Appellate Court and Supreme Court of Illinois was such as to call for review and reversal by the Supreme Court of the United States.

Wherefore, petitioner prays for the allowance of your writ of certiorari to the Appellate Court of Illinois to the end that the cause herein may be reviewed and decided by this Court, and that the decree and orders herein may be reversed, and for such relief as this Court may direct.

GEORGE A. MASON,
GEORGE A. MASON, JR.,
WEIGHTSTILL WOODS,
Attorneys for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1949.

No. 243

ALTHEA J. CUNNINGHAM,

Petitioner,

vs.

CITY OF CHICAGO, a Municipal Corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

MAY IT PLEASE THE COURT:

The respondent, City of Chicago, a municipal corporation, opposes the position for certiorari on the following grounds:

I.

The petitioner failed to raise any constitutional issue in the state courts, and is therefore precluded from seeking a review in this court.

The petitioner, in her original complaint and in her briefs in the Appellate and Supreme Courts of Illinois,

as well as in her petition for certiorari to this court, has never contended that Section 42a of the Local Improvement Act (1947 Ill. Rev. Stats., chapter 24, paragraph 84-42a) was unconstitutional. On the contrary, it has always been her position that the Act is constitutional but that it provides for the creation of a trust fund to pay the unpaid balance of interest when the principal of a condemnation judgment has been paid in full. The issue raised by the petitioner in all the State courts was the construction, rather than the constitutionality, of the Act. This court and the Illinois Supreme Court have consistently held that the construction of a statute does not raise a constitutional issue.

Wilson v. *Cook*, 90 L. Ed. 793, 327 U. S. 474;
Neblett v. *Carpenter*, 83 L. Ed. 182, 305 U. S. 297, 59 S. Ct. 170;
Cooper v. *Palais Royal Theatre Co.*, 320 Ill. 44, 49;
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Dean v. *Board of Education*, 386 Ill. 156, 157.

Furthermore, the petitioner appealed to the Appellate Court of Illinois from the decision of the trial court rather than to the Supreme Court of Illinois. The law in Illinois and in this court is well settled that one waives all constitutional questions by appealing from a trial court's decision to the Appellate rather than to the Supreme Court.

The People v. *Richardson*, 397 Ill. 84;
The People v. *Rosenthal*, 370 Ill. 244, 247;
Central U. Teleph. Co. v. *Edwardsville*, 70 L. Ed. 229, 269 U. S. 190; 46 S. Ct. 90;
Parker v. *Illinois*, 92 L. Ed. 886, 333 U. S. 571; 68 S. Ct. 708.

In *Central U. Teleph. Co.* v. *Edwardsville*, 70 L. Ed. 229, 269 U. S. 190, 46 Sup. Ct. 90, the telephone company filed a writ of error in this court to review a judgment of the Supreme Court of the State of Illinois which declined to hear the constitutional questions presented on the ground that they had been waived by the telephone company appealing to the Appellate Court from an adverse decision entered by the Circuit Court of Madison County, Illinois. This court, in dismissing the writ of error, construed the statute of the State of Illinois which provided that all appeals involving a constitutional question should be taken directly to the Supreme Court of Illinois, and said (70 L. Ed. p. 231):

> "The construction of this statute has been uniformly held to be that where a question involves the Constitution, it must be taken on error or appeal to the supreme court, and that if it be taken to the appellate court on other grounds, the party taking the appeal or suing out the writ of error shall be held to have waived the constitutional questions. *Indiana Millers' Mut. F. Ins. Co.* v. *People*, 170 Ill. 474, 49 N. E. 364; *Robson* v. *Doyle*, 191 Ill. 566, 61 N. E. 435; *Case* v. *Sullivan*, 222 Ill. 56, 78 N. E. 37; *Poe* v. *Ulrey*, 233 Ill. 56, 84 N. E. 46; *R. Haas Electric & Mfg. Co.* v. *Springfield Amusement Park Co.*, 236 Ill. 452, 23 L. R. A. (N. S.) 620, 127 Am. St. Rep. 297, 86 N. E. 248; *Scott* v. *Artman*, 237 Ill. 394, 86 N. E. 595; *Vermilion Special Drainage Dist.* v. *Shockey*, 238 Ill. 237, 87 N. E. 335. * * *"

This court held that the statute was fair, and a litigant who appealed to the Appellate Court of Illinois waived all Federal and state constitutional questions, saying (70 L. Ed. p. 231):

> "It seems to us that the practice under the statute of Illinois above quoted is entirely fair. If the litigant has a constitutional question, Federal or state, he may take the case directly to the supreme court and have that question decided together with all the

> other questions in the case, and then if the Federal constitutional question is decided against him, he may bring it here by writ of error or application for certiorari. If he elects to take his case to the appellate court, he may have the nonconstitutional questions considered and decided, but he gives up the right to raise constitutional objections in any court."

The decision in the *Edwardsville* case was followed and approved in *Parker* v. *Illinois,* 92 L. Ed. 886, 333 U. S. 571, 68 S. Ct. 708, where the court said (92 L. Ed., 888-889):

> "The Court said in the Edwardsville Case that when the waiver is founded on a failure to comply with the appellate practice of a State, the question turns on whether that practice gives litigants 'a reasonable opportunity to have the issue as to the claimed right heard and determined' by the state court . 269 U. S. pp. 194, 195, 70 L. ed. 231, 46 S. Ct. 90. It was there held that the Illinois practice of requiring constitutional questions to be taken directly to the Illinois Supreme Court and of refusing to review them if review was first sought in the Appellate Court satisfied the requirement. We adhere to that decision. The channel through which the constitutional questions, raised by petitioner in his attack on the amended order, could have been taken all the way to this Court was not only clearly marked, it was also open and unobstructed."

Here the petitioner appealed to the Appellate Court of Illinois from the judgment of the trial court (Tr. 33-34). By so doing she was waived her right to raise any constitutional objections.

Surprisingly, the contentions raised in the present petition are identical with those raised in the case of *The Trust Company of Chicago, Admr. of the Estate of Elizabeth Palmer Smith, Deceased, et al.* v. *City of Chicago, et al.*, 320 U. S. 737, 88 L. Ed. 437, in which this court denied a petition for writ of certiorari. In the *Trust*

Company case the petitioners stated their theory of the case to be (Petition for Writ of Certiorari, page 18):

> "Condemnation proceedings provide a means of making a contract upon the court record for the purchase of real estate from an unwilling owner. All usual principles of equity and of chancery procedure which govern in ordinary sales of real estate, apply in the liquidation of that contract. Petitioners say that the judgment order is the signing of that contract, that the prior proceedings and the constitutional provisions are the terms of the contract. The seller and purchaser of real estate are trustees for each other in contracts off the court record, from the time that the contract is signed until it has been fully performed. Petitioners say that the same is true when purchase is made by condemnation, from the time when the judgment becomes final. The condemnor as purchaser of real estate is trustee for the purchase price from the date of such judgment until payment in full with interest has been made to the property owner. *Finn* v. *Wetmore*, 212 Ill. App. 550 at 553 and 554 and cases there cited."

In the present petition the petitioner states her theory of the case to be (Page 12):

> "Condemnation proceedings provide a means of making a contract upon the court record for the purchase of real estate from an unwilling owner. All usual principles of equity and of chancery procedure which govern in ordinary sales of real estate, apply in the liquidation of that contract. Petitioners say that the judgment order is the signing of that contract, that the prior proceedings and the constitutional provisions are the terms of the contract. The seller and purchaser of real estate are trustees for each other in contracts off the court record, from the time that the contract is signed until it has been fully performed. Petitioners say that the same is true when purchase is made by condemnation, from the time when the judgment becomes final. The condemnor as purchaser of real estate is trustee for the purchase price from the date of such judgment until payment in full with

interest has been made to the property owner. *Finn* v. *Wetmore,* 212 Ill. App. 550 at 553 and 554 and cases there cited. (See pages 44-45, below.)"

In the *Trust Company* case the petitioners set forth their contention as follows: (Petition for Writ of Certiorari, page 3):

"Your petitioners urge that the Supreme Court of Illinois by its order without any opinion, abdicated its constitutional duty to your petitioners to review and pass upon the constitutional and federal questions presented by this record to the Circuit Court of Cook County and to the Supreme Court of Illinois. That in so doing said Court arbitrarily seeks to change the inalienable and fundamental personal and property rights of your petitioners under the bill of rights of the Constitution of the State of Illinois and the United States, into mere matters at the grace and permission of the Supreme Court of Illinois (Tr. 74-76). Also to change the obligatory jurisdiction of the Supreme Court of Illinois into merely discretionary jurisdiction. Thereby your petitioners were denied an obligatory hearing as to their vested rights, their contractual rights, and equal application of law, contrary to the fifth and fourteenth amendments of the Constitution of the United States. *People* v. *Kelly,* 361 Ill. 54 at 59, 60."

In the present petition the petitioner sets forth her contention as follows (Page 13):

"Your petitioner urges that said Appellate Court by its order and Opinion, and also the Circuit Court of Cook County and the Supreme Court of Illinois by orders without any opinion, abdicated constitutional duty to your petitioner, and refused just remedy and failed to review and pass upon the constitutional and federal questions presented by this record to all said Courts of Illinois.

"That in so doing said Courts arbitrarily seek to change the fundamental personal and property rights of your petitioner under the bill of rights of the Constitutions of the State of Illinois and the United

States, into mere matters at the grace and permission of the Courts of Illinois. Also to change the obligatory jurisdiction of the Courts of Illinois into merely discretionary jurisdiction. Thereby your petitioner was denied an obligatory hearing as to her vested rights, her contractual rights, and equal application of law, contrary to Article VI, paragraph 2 and the fifth and fourteenth amendments to the Constitution of the United States, and contrary to due process of law. *People* v. *Kelly*, 361 Ill. 54 at 59, 60; *Cities Service Oil Company* v. *Dunlap*, 308 U. S. 208 at 212. (See page 30 below.) "

Evidence of the fact that Section 42a of the Local Improvement Act and the contentions of the petitioner were before this court in the *Trust Company* case is shown by the statement of the Appellate Court of Illinois in the case of *Boal* v. *City of Chicago*, 330 Ill. App. 614 (Abst. Opinion), cited with approval by the Appellate Court in this case, where the court said (Tr. 38-39):

"Plaintiff contends that the statute of limitations does not apply to his claim because under Section 42a of the Local Improvement Act (ch. 24, par. 84, Ill. Rev. Stat. 1945), a direct trust is established for the benefit of the landowner whose property is taken for the improvement; that the instant case is based upon that section and that the point now raised by plaintiff has not been passed upon by the Appellate Courts nor the Supreme Court. Counsel for plaintiff state that in *Trust Co. of Chicago* v. *City of Chicago*, 327 Ill. App. 222, Section 42a 'was referred to by counsel merely *in argumento*,' but they contend that it was not involved in that case and '*was not relied upon by the appellant company.*' We have before us the briefs that were filed in that case, and while it is true that in the plaintiffs' brief they did not, apparently, rely upon Section 42a, we find that they were allowed to file, upon their request, 'Supplemental Citations and Suggestions,' which is a brief of thirty-six printed pages and we find therein that the plaintiffs cite Section 42a and contend that it establishes a 'special trust fund

applicable primarily to pay interest upon the condemnation awards which are charged specially by the statute upon the first installment,' when not promptly paid. 'Thereby the interest which accrues on first installment of special assessment is a permanent tax lien until paid, free from any and all statutes of limitation.' The argument made by the City in that case was practically the same as its argument upon the instant point in the case now before us. In *Trust Co. of Chicago* v. *City of Chicago* the opinion states: 'Under plaintiffs' theory a trust relationship existed between the parties, and the City of Chicago was therefore precluded from interposing the bar of the five-year statute of limitations,' and it was held, properly, we think, that 'plaintiffs' theory of a trust as set forth in their briefs is without merit.' The Supreme Court denied an appeal in that case. (391 Ill. 629.) * * * We conclude that the contention of plaintiff that Section 42a establishes a direct trust for the benefit of plaintiff in the instant proceeding is without the slightest merit; that no trust relationship exists between the City and plaintiff, and therefore the statute of limitations applies to the instant claim.''

It is apparent that counsel for the petitioner, in this case, is attempting to secure from this court a review of its decision, adverse to the petitioners in the *Trust Company* case, in which they advanced the identical contentions which are being advanced in this case. It is also apparent that the petitioner, by appealing to the Appellate Court of Illinois rather than directly to the Supreme Court of Illinois from the decision of the trial court, has waived all federal and state constitutional issues. Therefore, her petition for certiorari should be denied.

II.

In essence the petition for certiorari charges that the judgments of the state courts are erroneous. The federal constitution offers no protection against erroneous judicial action even if the charge were well grounded.

The petition for certiorari is rather difficult to follow, but a careful analysis discloses that essentially it charges that: (1) the trial court erred in deciding the case summarily upon a motion to dismiss the complaint because it was not filed within five years from the date when the cause of action accrued; (2) the Appellate Court erred in sustaining the judgment of the trial court; (3) the Supreme Court of Illinois erred in refusing to grant an appeal from the Appellate Court.

In short, the petitioner is complaining, not of want of due process but of alleged erroneous decisions of the State Courts in the course of the usual judicial process. The Federal Constitution offers no guarantee of correct decisions.

Ballard v. *Hunter,* 204 U. S. 241, 258.
Chicago L. Ins. Co. v. *Cherry,* 244 U. S. 25, 30.

Petitioner was given her day in court. She filed her complaint through counsel and was given full opportunity to resist the defendant's motion to dismiss the complaint. The trial court took the view that the undisputed allegations in the complaint disclose that it was not filed within the time required by statutory limitations. Dismissal for such reason is a time-honored procedure and no case can be found questioning the fact that it is due process. From a constitutional point of view it is immaterial whether the decision of the trial court is correct or erroneous.

It is also well settled that appeals are not essential to due process. *McKane* v. *Durston,* 153 U. S. 684, 687.

Even a statute which declares writs of error in criminal cases punishable by death to be writs of grace and not writs of right does not violate the Federal Constitution. *Andrews* v. *Swartz,* 156 U. S. 272.

In the Appellate Court of Illinois the petitioner was given a full hearing upon printed briefs filed by her and a written opinion was filed assigning reasons for the decision of the court. Pursuant to statute the petitioner filed her Petition for Leave to Appeal to the Supreme Court of Illinois but failed to convince the latter court that the Appellate Court had erred.

This case is on all fours with the case of *The Trust Company of Chicago, Admr. of the Estate of Elizabeth Palmer Smith, Deceased, et al.,* v. *City of Chicago, et al.,* 329 U. S. 733, 91 L. Ed. 633, where this court denied a petition for writ of certiorari. There the petitioners, one of whose attorneys, namely, Weightstill Woods, is also associate counsel in the present petition, filed a complaint in chancery contending that the City of Chicago was trustee for unpaid interest on condemnation judgments; that, therefore, the statute of limitations did not apply; and prayed for an accounting from the City of Chicago of all unpaid interest on condemnation judgments. The City filed a motion to dismiss, which was accompanied by affidavits and documents showing that the condemnation judgments were paid in full and that there only remained unpaid interest, which was barred by the statute of limitations. The trial court sustained the motion to dismiss and the plaintiffs appealed directly to the Supreme Court of Illinois. The Supreme Court of Illinois held that there was no constitutional question involved and transferred

the cause to the Appellate Court. The Appellate Court affirmed the judgment of the trial court. (*Trust Company of Chicago* v. *City of Chicago,* 327 Ill. App. 222). The petitioners filed a Petition for Leave to Appeal to the Supreme Court of Illinois, which petition was denied (391 Ill. 629). The petitioners then filed their petition for writ of certiorari in this court, which was denied.

In the petition for writ of certiorari to this court in the *Trust Company* case, the petitioners made the same contention as the petitioner is making in the present petition. Therefore, this court has previously passed on the same contention now made by the petitioner and refused to consider it.

The petitioner complains that the opinion of the Appellate Court was brusque. There was no need for a lengthy opinion. The real issue in the case had been repeatedly determined by the Illinois courts in *Blakeslee's Warehouses* v. *City of Chicago,* 369 Ill. 480; *Cohen* v. *City of Chicago,* 377 Ill. 221; *Chapralis* v. *City of Chicago,* 326 Ill. App. 554; *Trust Company of Chicago* v. *City of Chicago,* 327 Ill. App. 222; and *Boal* v. *City of Chicago, et al.,* 330 Ill. App. 614. It is not surprising that the Illinois courts refused to consider seriously the fantastic theory which the petitioner evolved in an attempt to circumvent the well settled rule laid down in the above cited cases that suit must be brought to recover interest within five years after the principal of a judgment has been paid in full.

The petitioner has had full and fair hearings in the state courts and the judgments therein have been in conformity with reason and settled law.

III.

The claim of the petitioner is solely for interest and therefor barred by the statute of limitations because suit was not started within five years after payment of the principal of the judgment.

This case presents the simple situation of a suit brought for interest upon a judgment more than five years after the principal has been paid in full. The law has been thoroughly established in Illinois that the five year statute of limitations applies in this situation.

On June 9, 1926 the petitioner recovered a judgment against the City of Chicago in a proceeding under the Local Improvement Act in the sum of $164,000 (Tr. 4). On September 10, 1927 the City of Chicago made a partial payment of $41,000 on said judgment, and on December 22, 1927 paid the balance of the principal of said judgment (Tr. 4, 26, 28). More than five years later, that is, on September 28, 1933, the original complaint in this suit was filed (Tr. 1). The complaint alleged that interest in the sum of $12,000 upon said judgment remained unpaid; that demands for the payment of the interest were made upon the City of Chicago and payment thereof was refused, and claim is made for said interest, together with interest thereon (Tr. 4, 5).

The voucher used to effect final payment of the judgment (Tr. 28) contained the following language:

> "• • • being in full payment for said condemned land and in full of all claims for damages to same by reason of said proceedings."

On the back of the voucher (Tr. 29) appeared:

"Received of the City of Chicago full payment of the within account.

Althea Ione Cunningham
By Secor Cunningham."

Situations identical with that of the present case have been squarely passed upon by the courts of the State of Illinois. In each case it has been held that a simple question of application of payments is involved and that the language of the voucher issued by the City of Chicago in making payments upon condemnation judgments clearly establishes that the money paid was intended by the parties to be applied in full to the principal of the judgments. This application of payments leaves only interest unpaid and suit therefor must be filed within five years. (*Cohen* v. *City of Chicago,* 377 Ill. 221, 235-236; *Chapralis* v. *City of Chicago,* 326 Ill. App. 554; *Trust Company of Chicago* v. *City of Chicago,* 327 Ill. App. 222; *Guaranty Mortgage & Security Company, et al.,* v. *City of Chicago,* 328 Ill. App. 276.)

The petitioner completely ignores these decisions which conclusively dispose of the only real issue in the case. There is no distinction between the facts in this case and the facts in the four cases above cited. Petitioner argues that the City is a trustee for the benefit of the petitioner and that the statute of limitations does not run against a beneficiary of a trust. This argument was made in the briefs in *Trust Company of Chicago* v. *City of Chicago,* 327 Ill. App. 222, and was held untenable.

The Appellate Court held that the argument of the petitioner, to the effect that Section 42a of the Local Improvement Act created a trust fund for the benefit of the petitioner and therefore the claim is not barred by the statute of limitations, was presented to the Appellate Court in the cases of *Boal* v. *City of Chicago,* 330 Ill. App.

614, (Abst. Opinion) and in *Trust Co. of Chicago* v. *City of Chicago,* 327 Ill. App. 222 (Petition for Leave to Appeal to Illinois Supreme Court denied in 391 Ill. 629; certiorari denied 329 U. S. 733; 67 S. Ct. 95; 91 Law Ed. 633) and in each instance the court rejected the theory of the petitioner. In the *Boal* case the court, in an exhaustive and learned opinion, reviewed the law pertaining to claims for interest on condemnation judgments and the creation of express trusts under the Local Improvement Act, and held:

> "We conclude that the contention of plaintiff that Section 42a establishes a direct trust for the benefit of plaintiff in the instant proceeding is without the slightest merit; that no trust relationship exists between the City and the plaintiff, and therefore the statute of limitations applies to the instant claim.
>
> • • • • • •
>
> "In our judgment the new point raised by plaintiff's astute attorneys is but an effort to revitalize a dead claim.
>
> "This appeal is without merit and the judgment order of the Circuit Court of Cook County should be and it is affirmed."

The petitioner relies upon the case of *People* v. *Smart,* 333 Ill. 135, as authority for her contention that Section 42a of the Local Improvement Act creates a trust fund and therefore the statute of limitations does not apply. In the *Smart* case the village collector divided the special assessment into 10 installments. He neglected to deduct or credit to the first installment of the assessment the full amount of the condemnation award, but deducted the award from the 10 installments *pro rata.* The total amount awarded was less than the amount of the first installment of the assessment. The court stated the question on appeal to be as follows (p. 136):

> "The only question presented by this appeal is whether the award for property taken should be

> credited entirely to the first installment in each instance or credited *pro rata* to all the installments into which the assessment is divided."

The court held that Section 42a gives to municipalities, in a combined proceeding for the construction of an improvement and the taking of property therefor, the power to spread the cost of construction in 10 installments, however, the Act specifically requires the compensation for property to be applied to the first installment, and said (p. 138):

> "The fund for the payment of compensation having been thus provided for by the first installment, it would seem logically to follow that payment of awards of property should be made out of this fund. The crediting of an award *pro rata* against the entire ten installments is not such a compliance with the constitution as would warrant the taking of the property for public use prior to the time when the last installment became due and is manifestly against the intention of the legislature as expressed in the act."

The effect of the *Smart* decision was not that Section 42a created a trust fund for the payment of a condemnation award but rather that the condemnation award should be credited entirely to the first installment rather than prorating it against the entire 10 installments.

Section 42a of the Local Improvement Act and the *Smart* case were discussed in *Cohen* v. *City of Chicago,* 377 Ill. 221, where the facts were analogous to the facts in this case. There, condemnation awards were entered, and subsequent thereto the principal amounts of the awards were paid in full, but the interest remained unpaid. At the time of payment the parties accepted vouchers, identical to the vouchers in this case, reciting that the payments were "in full payment for said condemned land and in full of all claims for damages to same by reason of said proceedings."

On the back of each of these vouchers was printed a receipt which read, "Received of the City of Chicago full payment of the within account." The court in discussing Section 42a and the *Smart* case said (p. 230):

> "This court there construed said section 42a to mean that a fund must be provided for the payment of compensation for property taken and that said section did so provide by requiring such compensation to be paid out of the first installment. It was further held that the crediting of an award for property taken, *pro rata* against the entire ten installments, would not constitute a compliance with the constitution. This holding was based upon the proposition that property cannot be taken for public use, under the constitution unless, and until, the amount of the compensation has been fixed and paid. In this respect the questions involved in that case were not different from the question involved in this case, relating to section 16 of the act."

The court stated that as a general rule a payment is first credited to interest and the balance to principal but that such an application could be waived. The court held that the plaintiffs, by accepting payment and signing the vouchers and receipts hereinbefore set forth, clearly indicated that it was the intention of all parties that the payments made were intended and accepted, as full payment and liquidation of the judgments, leaving the interest unpaid, saying (p. 235):

> "On the face of the vouchers it clearly appears that the payments were for the balance of compensation due, which was the balance of the judgment, in each instance. The receipts on the back of the vouchers are, to the effect, that the payee, named on the face of the vouchers, and by whom the receipt is signed, has received full payment for the account described in the vouchers. * * * In our view, the record shows conclusively that it was the intention of all parties that the delivery of the vouchers and checks was in full

satisfaction of the amounts of compensation, as fixed by the judgments."

Whatever rights the petitioner may claim under Section 42a of the Local Improvement Act the court, in the *Cohen* case, has held were waived by the signing of the vouchers and receipts clearly showing that payment was made and accepted in full of the condemnation award. The *Cohen* case is also authority for the proposition that the claim of the petitioner is clearly one for interest under Section 3 of the Interest Act (1947 Ill. Rev. Stat., Chap. 74, par. 3).

It is apparent that the claim of the petitioner is one for interest barred by the 5 year statute of limitations and, therefore, the decision of the Appellate Court was proper.

Conclusion.

It is respectfully submitted that the issues raised by the petition for writ of certiorari are no longer debatable. This court has ruled adversely to the petitioners in the cases of *The Trust Company of Chicago, Admr. of the Estate of Elizabeth Palmer Smith, Deceased, et al.*, v. *City of Chicago, et al.*, 329 U. S. 733, 91 L. Ed. 633, and *The Trust Company of Chicago, Admr. of the Estate of Elizabeth Palmer Smith, Deceased, et al.*, v. *City of Chicago, et al.*, 320 U. S. 737, 88 L. Ed. 437, where identical issues were presented to this court. The decision of the Appellate Court of Illinois is in accordance with the law, and in no way conflicts with the Federal Constitution. The petitioner waived her right to raise any constitutional issue by appealing to the Appellate Court of Illinois. Therefore, the petition for writ of certiorari should be denied.

Respectfully submitted,

BENJAMIN S. ADAMOWSKI,
Corporation Counsel of the City of Chicago,
511 City Hall, Chicago 2, Illinois,
Attorney for Respondent.

L. LOUIS KARTON,
Head of Appeals and Review Division,

SYDNEY R. DREBIN,
Assistant Corporation Counsel,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1949

No. 243

ALTHEA I. CUNNINGHAM,
Petitioner,

vs.

CITY OF CHICAGO, a Municipal Corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS.

REPLY BY PETITIONER CUNNINGHAM.

GEORGE A. MASON,
GEORGE A. MASON, JR.,
WEIGHTSTILL WOODS,
69 W. Washington Street,
Chicago 2, Illinois.
Attorneys for Petitioner.

GEORGE A. MASON,
GEORGE A. MASON, JR.,
WEIGHTSTILL WOODS,
Of Counsel.

BARNARD & MILLER, 33 S. Market St., Chicago 6. FRanklin 2-0562

INDEX SUMMARY FOR CUNNINGHAM REPLY.

The brief for City of Chicago in opposition to Cunningham petition for writ of certiorari, does not contest nor oppose any citation nor any statement made by Cunningham petition. All that Mrs. Cunningham has set forth by her petition stands admitted on this record by the City of Chicago. The brief in opposition for the City of Chicago proceeds upon new matter by way of confession and avoidance. We dispose of that as follows:

I.

The petition fully shows that a federal question was raised and lies exposed upon this record in the same manner that like question arose in the *Missouri* cases which petitioner has cited. In the *Missouri* cases this Supreme Court took jurisdiction and reversed the Missouri courts.

The Cunningham petition does not contend that the construction of a statute will raise a constitutional issue for review in this court. Counsel for the City of Chicago should not say that. The Cunningham petition shows that the case at bar is not within nor subject to the rule that an appeal to an Appellate Court may be a waiver of some constitutional questions. We discuss that rule fully in this reply.

Petitioner denies that there is any identity of pleading or subject matter between this case and the *Trust Company of Chicago* case. There are basic differences in pleading and theory and facts.

II.

Petitioner does not contend that this court will review any judgment of a state court merely because it is erroneous. The petition urges that this Supreme Court has

reviewed and will review a failure by a state court to give a fair hearing of the matter well pleaded. Petitioner has set forth your decisions to establish that very fact of your constant exercise of jurisdiction.

There is no issue here about guarantee of correct judgments. Counsel for the City of Chicago should not say that.

This case is substantially different from the *Trust Company of Chicago* case, whether we examine pleading, theory or fact.

Petitioner has not had full and fair hearing, nor any hearing whatever upon her pleading in chancery. That hearing has been refused in the same manner that hearing was denied by state courts in the *Missouri* cases which are discussed by our petition. A fair hearing has been denied and refused at bar by the Illinois courts, upon the case set forth by pleading in chancery, asserting an historic right over which the court of chancery has exclusive jurisdiction.

III.

It is not true, as opposing counsel say, that the claim of petitioner is solely for interest under an interest statute. The Cunningham petition clearly demands interest accruing on a land condemnation judgment as part of just compensation and upon the security of a constitutional lien, which is confirmed by the Illinois and Federal Supreme decisions that are cited and discussed by the Cunningham petition.

For like reasons, the pleading by Cunningham is not for a simple situation of claim for interest upon a judgment of mine run quality. The Cunningham pleading seeks recovery for part of just compensation, accruing as part of a judgment of condemnation that is secured by a constitutional lien, and confirmed by Supreme Court of Illinois recent decisions.

Petitioner has not waived any rights at all. Mrs. Cunningham has pressed promptly and energetically all remedies which are open under the usual practice in the courts of Illinois. .....Petition and reply.

The *Cohen* case arose as a suit at law with entirely law pleading and statement of facts. *Commissioner* v. *Sunnen*, 333 U. S. 591, 601. .....Pages 10-11

CUNNINGHAM AFFIRMATIVE REPLY.

A. The Edwardsville decision, 269 U. S. 190, has no resemblance to the present record, and is not applicable to the case presented by Mrs. Cunningham as petitioner before this court. .....Pages 1-7

B. The *Trust Company of Chicago* case, 327 Ill. App. 222 and similar citations, are not in point but are distinguished by fact and pleading. .....Pages 7-9

C. The basic stand by petitioner upon established procedure in Illinois, upon rights under historic equity over which chancery has exclusive jurisdiction (which opposing counsel do not deny) renders inapplicable all citations made by counsel for the City of Chicago. Those citations are merely decisions at law as to legal rights within the range of pleadings at law. .....Petition and Pages 9-11

D. Each of the provisions of the constitutions upon which petitioner Cunningham relies is, and all of them are, self-executing. So that our suit and petition rely directly upon the constitutions. The self-executing nature of these provisions of the constitutions has not been urged nor considered in any of the citations mentioned by counsel for the City of Chicago. .....Pages 4-10-11

E. Petitioner Cunningham has shown a clear case for review and reversal by this Supreme Court. .....Page 12

IN THE

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OCTOBER TERM, A. D. 1949

No. 243

ALTHEA I. CUNNINGHAM,
Petitioner,

vs.

CITY OF CHICAGO, a Municipal Corporation,
Respondent.

REPLY BY PETITIONER CUNNINGHAM.

A.

The ruling made by the *Edwardsville* case does not apply to the record at bar because:

First: The trial court in the *City of Edwardsville* case had before it and considered a stipulation of facts, and made findings and determined special rulings of law. Nothing of that sort occurred, and all of it is wholly absent from the Cunningham record. (Rec. 22, Petition 2)

Second: In the *Edwardsville* case, the Supreme Court of Illinois was fully briefed and filed two full length opinions in different years; but in the *Cunningham* case that court did not file any opinion at any time, and never took jurisdiction of the case.

Third: In equity cases in Illinois, the Supreme Court must review each case upon the facts as well as upon the law. (Civil Practice Act, § 92 (3b)). The *Edwardsville* case was a suit in debt at law, where the facts found by the Appellate Court were final. This *Cunningham* case relies upon a complaint in equity upon matter over which the court of chancery has exclusive jurisdiction. It was the bounden duty of the Supreme Court of Illinois to review and revise any error of fact committed by the Appellate Court of Illinois. The Supreme Court of Illinois refused and failed to perform its duty. That court evaded its duty by refusing to take jurisdiction and failing to reverse the ruling by the Appellate Court of Illinois, which asserted as fact what had not been determined by the Circuit Court. That Circuit Court never tried any facts at all, but refused to do so.

Fourth: In the *Edwardsville* case, counsel did not suggest nor urge and the courts did not consider, the power and duty cast upon the Appellate Court of Illinois by Section 32 of Chapter 37 Illinois Revised Statutes, which is the Courts Act of Illinois. That statute was not mentioned nor discussed in the *Edwardsville* case. (That statute is set forth as appendix to this reply, below at page 13)

By that statute as authorized by the Constitution of Illinois (Art. VI, Section 11), the Legislature of Illinois made provision in accord with Article VI, Section 2 of the Constitution of the United States (page 16 of Cunningham petition) that the Appellate Court of Illinois did have power and duty to pass upon all questions submitted to it, in relation to matters of constitutional law.

Furthermore, the City of Chicago cannot now claim a waiver, because it did not ask for transfer from Appellate Court to the Supreme Court of Illinois, as it did in the *Wanless* case, 378 Ill. 453, and in the *Seifried* case, 378 Ill.

479, and many other cases. Thereby the city accepted the Appellate Court of Illinois as the appropriate tribunal to decide the federal right and constitutional manner of questions and issues that are before the court at bar.

Since the Appellate Court by Section 32 of Chapter 37 of the Courts Act of Illinois, and by Article VI, Section 2 of the Constitution, has the *Power* to decide all questions presented by the present record, and since the city made no motion for change of venue from the Appellate Court, all question of jurisdiction was closed, as provided by Section 11 of the Civil Practice Act of Illinois. The city speaks much too late, for the first time in this Court.

Fifth: In the *Edwardsville* case, counsel did not suggest nor urge and the courts did not consider, the established principle of law, that where the constitutional question first appears by denial by the Appellate Court of constitutional federal right (which is the state of record now at bar) then there is no basis for any claim of waiver, and no such contention can be heard from opposing party or counsel.

Sixth: In the *Edwardsville* case, counsel did not suggest nor argue and the courts did not consider, that all constitutional questions properly and necessarily go to the Appellate Court of Illinois, save only when there is presented a *new debatable interpretation or construction* of some provision of the constitution of Illinois. That separation of appealable matter is thoroughly established by all authorities in Illinois.

Clarke v. *Storchak,* 384 Ill. 564; Appeal dismissed, 322 U. S. 713.

Seventh: In the *Edwardsville* case, counsel did not suggest nor argue and the courts did not consider the basic principle that some constitutional questions are self-executing. They act directly at once. They do not require nor

permit any construction nor interpretation. Any and all courts must execute them.

Each and all of the constitutional provisions on which petitioner Cunningham now relies are self-executing. The application of them to the pleadings raises only issues which properly are taken to the Appellate Court of Illinois, and would not have been received by the Supreme Court of Illinois upon direct appeal.

Eighth: The absence of jurisdiction on direct appeal to the Supreme Court of Illinois, for the kind of constitutional issues that are shown by the Cunningham petition and record now at bar, is illustrated by refusal of Supreme Court of Illinois to accept jurisdiction upon direct appeal, in the case of *Trust Company of Chicago* v. *City of Chicago*, No. 29438, where the order of transfer was entered by the court without any opinion to go with it. A similar case is *City of Chicago* v. *McCausland*, 374 Ill. 34, 308 Ill. App. 538, and 379 Ill. 602. That was a real merry-go-round in which the Supreme Court of Illinois wrote two opinions, one refusing jurisdiction on direct appeal, and a second one after the case had been through the Appellate Court. The final opinion by the Supreme Court of Illinois allowed the second appeal and reversed the Appellate Court. This *McCausland* case shows the utter futility of going first to the Supreme Court of Illinois on self-executing provisions of the constitution.

The self-executing provisions permit of mandamus relief against cities where as in Illinois *scire facias* is not permitted as remedy.

People ex rel. v. *Glencoe*, 372 Ill. 280.

Thus in *Stop* v. *Wilt*, 177 Ill. 620, the court ruled that a deed was not needed from a mortgagee who was a party to the condemnation suit, that the judgment itself operates

as a self-executing transfer of claim against the land to the fund which is the substitute for the land.

And in *City of Chicago* v. *Salinger*, 384 Ill. 515, the court ruled that where land was condemned that was covered by a mortgage, the lien of the mortgage was automatically transferred to the fund by the judgment of condemnation.

Particularly we mention the case of *People ex rel. Wanless* v. *City of Chicago*, 378 Ill. 473, where the Supreme Court of Illinois stresses the self-executing nature of the provision of the constitution for condemnation of real estate. That opinion establishes that the judgment for condemnation is only a step in the process of taking, and that the constitution follows throughout until full payment with interest has been completely made to the landowner who was dispossessed by the eminent domain proceeding. The theory upon which the city operates namely, that when once it enters the condemnation judgment, it becomes merely a judgment debtor, with the rough and ready defenses of a judgment debtor, is directly contrary to the *Wanless* decision and unworthy of the great City of Chicago. The direct application of the constitutional provision for full and complete just compensation with interest, remains a sword to the property owner until he is paid. The city admits on this record that payment of interest has not been made to Petitioner. But payment was made to Garrett.

Eighth: In the *Edwardsville* case there was discussed and considered only section 118 of the Civil Practice Act of Illinois (now section 75(1) of Civil Practice Act) which reads as follows:

> "Appeals shall be taken directly to the Supreme Court in all cases in which a franchise or freehold or the validity of a statute or a *Construction* of the constitution is involved, and in cases in which the validity of a municipal ordinance is involved and in which the trial judge shall certify that in his opinion the public interest so requires, and in all cases relating to revenue,

or in which the State is interested as a party or otherwise." (Italics added.)

Since the *Edwardsville* case was decided, the Supreme Court of Illinois has by *ipse dixit* further limited its direct appeal jurisdiction to exclude questions which it says are not debatable because a former case in that court is *stare decisis* on such question.

Richter v. *City of Mt. Carroll*, 398 Ill. 473 at 477 (1941).

Inasmuch as the *Wanless* case, 378 Ill. 453, at 459 (Petition 43) was *stare decisis* on the interest-just compensation-constitutional question in the case at bar, many years before appeal taken herein to the Appellate Court of Illinois, petitioner was forbidden by the statute and the *ipse dixit* rule of Supreme Court of Illinois, to apply to that court by direct appeal.

For each and all of the foregoing reasons, petitioner says that the *Edwardsville* case and the *Parker* case, 333 U. S. 571, have no bearing at all upon the jurisdictional phases of the case at bar.

The many changes and self-made limitations by the Supreme Court of Illinois cutting down its own sphere of jurisdiction, as shown above, has necessarily enlarged the classes of cases that must be heard, and has expanded the range of questions and problems, that must be appealed to and decided by the Appellate Court of Illinois on direct appeal. This voluntary and repeated narrowing by the Supreme Court of Illinois of its own jurisdiction on direct appeal, has made obsolete the language of the opinion by Your Honors in the *Edwardsville* case. That obvious truth, together with the incomplete briefing of the questions before your decision of that case in 1925, as shown above, by failure to mention the Appellate Court Act Section 32

and other pertinent features of Illinois procedural law, presents substantial reason why Your Honors may wish to re-examine the whole matter of the *Edwardsville* case. If you do so, present counsel believe that you will reverse it wholly. We say this particularly because your opinion in the *Edwardsville* case, does not mention Article VI Section 2 of the Constitution of the United States, which is a primary Self-Executing provision.

The argument made by Counsel for the City of Chicago, illustrates the fact that there is confusion in Illinois on the civil side, equally as great with reference to constitutional appellate review and federal question appellate review, as was true with reference to criminal law before Your Honors gave directions in the *Marino* case. 68 S. Ct. 240 ff. As shown above by the *McCausland* case, even the Supreme Court of Illinois was confused, and later corrected its own error, after the merry-go-round came back a second time from the Appellate Court.

B.

Likewise the *Trust Company of Chicago* case is not in point, 327 Ill. App. 222.

The pleading in that case did not claim for interest, but said that in equity all payments that had been made must be credited first to interest and thereafter upon the principal of the judgment, and thereby of necessity the balance due was principal of the judgment. That pleading did not mention Section 42a of the Local Improvement Act of Illinois and made no claim under it. That pleading did not involve nor mention any double judgment proceeding where as here at bar, both the taking of land and the assessment to pay for it are within one ordinance and one court proceeding. Section 42a is by express language of the statute (section 84-42a) applicable only to the combined improve-

ment double judgment proceeding. Thereby section 42a was nowise related to any pleading issue in that case. No claim was made at any time nor in any court in that case to recover under the special trust arising under section 42a. Counsel in that case did say *in arguendo* that the existence of section 42a in the Local Improvement Act was evidence that the legislature intended that the City of Chicago was and must be a trustee of any and all funds that might be used to pay the property owner. That statement was made as matter of law and not with relation to any fact or pleading in the case of *Trust Company of Chicago.*

Directly to the contrary is the record now at bar, (Rec. 13-21, petition 6-10 and throughout). The Amended Complaint in Chancery is bottomed squarely upon section 42a and the trust arising therefrom by the wilful and voluntary acts of the City of Chicago. The briefs in all the Illinois courts and here are based thereon. The record of any case sets the circumference of matter involved in any court of record. Matters outside that are mentioned *arguendo,* may have some persuasive effect, but the judgment that is rendered cannot be broader than the specific pleading in the prior record.

The avid manner in which the City of Chicago and the opinion by the Appellate Court seize upon the mention of Section 42a *arguendo* by counsel in another lawsuit, shows a complete failure to separate the court of record from a court of conversation. To step outside the pleading and seize upon such slight circumstance of argument, shows a desire to win by slurring unlike matters to create confusion. The same remarks were made by the opinion in the *Boal* v. *City of Chicago* case, (330 Ill. App. 614). They were not true then and are not true now, as a matter of factual pleading. The great emphasis upon a merely marginal circumstance by counsel for City of Chicago, is a clear indication that they have no defense.

The *Boal* case was abandoned because the sum claimed was too small to permit the Illinois Supreme Court to take jurisdiction on appeal. The *Trust Company of Chicago* case in this court did not assert the failure to give a fair hearing which is now urged under the *Missouri* cases. The denial of that federal right and argument to support it are absent from the petition and the briefs in *Trust Company* case.

The shallow and superficial nature of the reasoning of counsel for the City of Chicago is shown by quotations at pages 5 and 6 of their brief in opposition. They say that if two cases have the same major premise they are twins. If two cases arise in a condemnation proceeding, they say they are alike in all particulars. That manner of defense is like saying that if two men each have two hands and two feet, then they have the same identity, even though the men are of different races and live far apart geographically. In the language of the current popular song, the argument throughout by the City is "heap much smoke and no fire."

Nothing could be more absurd than the suggestion of the City that any one can change the major premise of a case in Eminent Domain. Inevitably that major premise arises directly out of the Constitutional provision that secures private property.

Therefore the present record is based upon fresh and new matter, which has not at any time so far as counsel know, been before this court.

C.

The basic stand taken by petitioner throughout her record and petition upon established procedure in Illinois, upon rights under historic equity over which in that State, chancery has exclusive jurisdiction and paramount control (Petition 36, which opposing counsel do not deny), renders

inapplicable all the citations by counsel for the City of Chicago. Those citations are merely decisions at law as to facts and legal rights arising within the range of pleadings at law. They cannot and they do not apply to pleadings in equity nor to facts and issues which are the exclusive domain of equity jurisdiction.

In the *Cohen* case 377 Ill. 221 at 236, recovery of interest was sought and obtained by a suit at law with pleadings at law, after the principal awarded by the judgment of condemnation had been paid to the dispossessed property owner, by checks, vouchers and receipts, which opposing counsel say are like those used in the activities prior to filing the case at bar. The Supreme Court of Illinois sustained that recovery of interest by that separate suit. That being true, it is difficult to see why opposing counsel seek to make so much of that case.

The *Wanless* case (378 Ill. 453) was later than any of the cases mentioned by counsel for the City of Chicago. Careful reading of opinion and record in the *Wanless* case, makes it clear that the Supreme Court of Illinois has abandoned the merely legal theories of former decisions, and by the *Wanless* case, emphasizes the constitutional basis for recovery by the property owner of interest accruing after entry of the judgment of condemnation, and continuing until payment of all accruing interest has been made to the property owner. This forthright emphasis of the constitutional right of the property owner, is not new but is a revival of the earlier decisions such as *Chicago and Eastern Illinois Railroad Company* v. *Hay,* 119 Ill. 493 at 502 and *Epling* v. *Dickson,* 170 Ill. 329 at 33 and *Mecartney* v. *City of Chicago,* 273 Ill. 276 at 281. As shown at page 36 of Cunningham Petition in this Court, in Illinois, the Court of Chancery is paramount over courts at law in trust matters. And thereby the chancery rulings we have men-

tioned, render citations by the City of Chicago of law cases, to be wholly inapplicable to this suit in equity.

> "But if the relevant facts in the two cases are separable, even though they be similar or identical, collateral estoppel does not govern the legal issues which recur in the second case. Thus the second proceeding may involve an instrument or transaction identical with but in a form separable from, the one dealt with in the first proceeding. In the situation a court is free in the second proceeding to make an independent examination of the legal matters at issue. It may then reach a different result, or if consistency in decision is considered just and desirable, reliance may be placed upon the ordinary rule of stare decisis. Before a party can involve the collateral estoppel doctrine in these circumstances, the legal matter raised in the second proceeding *must involve the same set of events or documents and the same bundle of legal principles that contributed to the rendering of the first judgment.*" (Italics supplied.)

Commissioner of Internal Revenue v. *Sunnen,* 333 U.S. 591 at 601. By her record here, Mrs. Cunningham shows an entirely new bundle of rights and principles of historic chancery as her basis for recovery.

D.

Each of the provisions of the constitutions upon which petitioner Cunningham relies, is and all of them are self-executing. They do not involve nor require any construction and are not debatable. Our suit and petition rely directly upon those provisions of the constitutions. We seek enforcement. The self-executing nature of those provisions of the constitutions has not been urged nor considered in any of the citations mentioned by the City of Chicago. As an instance of the right of petitioner, we refer again to the *Wanless* case, which is discussed above and at page 43 of petition.

E.

Petitioner Cunningham has shown a clear case for review and reversal by this Supreme Court.

As shown above at pages 1 to 7 and by the Appendix, the Appellate Court of Illinois has jurisdiction on direct appeal for all of the questions in this case that were submitted to it. Also as shown by the same matter, the Supreme Court of Illinois has refused to exercise jurisdiction on direct appeal over such questions and cases. Consequently, the brief by the city is wholly in error with reference to jurisdiction.

Also we have shown above at pages 7 to 11, that there has not been presented to this court any record like the present for seeking relief which we ask by our petition.

It follows that the petition should be granted, that the writ of certiorari should be issued and that this court should review and determine this case.

Respectfully submitted,

ALTHEA I. CUNNINGHAM,
Petitioner,
By GEORGE A. MASON,
GEORGE A. MASON, JR.,
WEIGHTSTILL WOODS,
Her Attorneys.

GEORGE A. MASON,
GEORGE A. MASON, JR.,
WEIGHTSTILL WOODS,
Attorneys for Petitioner.

APPENDIX.

ILLINOIS REVISED STATUTES—1947.
Ch. 37—Courts—Sec. 32.
p. 1123.

32. JURISDICTION-APPEALS, ETC. Sec. 8. The said appellate courts created by this Act shall exercise appellate jurisdiction only, and have jurisdiction of all matters of appeal or writs of error from the final judgments, orders or decrees of any of the circuit courts, or the Superior Court of Cook County, or county courts, or from the city courts in any suit or proceeding at law, or in chancery other than criminal cases, not misdemeanors, and cases involving a franchise or freehold or the validity of a statute and from final judgments or orders of any Court entered in proceedings for adoption. Appeals and writs of error shall lie from the final orders, judgments or decrees of the circuit and city courts, and from the Superior Court of Cook County, directly to the Supreme Court, in all criminal cases and in cases involving a franchise or freehold or the validity of a statute.

In all cases in which their jurisdiction is invoked pursuant to law, except those wherein appeals are specifically required by the Constitution of the State to be allowed from the Appellate Courts to the Supreme Court, the judgments or decrees of the Appellate Courts shall be final, subject, however, to the following exceptions: (1) In case a majority of the judges of the Appellate Court or of any branch thereof shall be of opinion that a case (regardless of the amount involved) decided by them involves a question of such importance, either on account of principal

or collateral interests, as that it should be passed upon by the Supreme Court, they may in such case grant leave to appeal to the Supreme Court on petition of parties to the cause, in which case the said Appellate Court shall certify to the Supreme Court the grounds of granting said appeal. (2) In any such case as is hereinbefore made final in the said Appellate Courts it shall be competent for the Supreme Court to grant leave to appeal for its review and determination with the same power and authority in the case, and with like effect, as if it had been carried by appeal to the said Supreme Court: Provided, however, that in actions *ex contractu* (exclusive of actions involving a penalty) and in all cases sounding in damages the judgment, exclusive of costs, shall be more than fifteen hundred dollars ($1,500.00), or in cases in which the judgment is against the plaintiff and there is issued by the Appellate Court, or by one of the judges thereof in vacation, a certificate to the effect that there is fairly involved in the claim of the plaintiff more than fifteen hundred dollars ($1,500.00). As amended by act approved June 6, 1945. L. 1945, p. 649, act approved July 25, 1945. L. 1945, p. 648.